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Still Blinking at Political Reality in Federal Elections: Colorado Republican Federal Campaign Committee v. Federal Election Commission

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Still Blinking at Political Reality in Federal Elections: *Colorado Republican Federal Campaign Committee v. Federal Election Commission*

The ideal of political equality—that each individual regardless of his position should have equal opportunity to express his political views and thereby influence the outcome of federal elections—is an important right of American citizenship.[1] When corporate contributions threatened this ideal in the early part of this century, Congress initially sought to preserve the integrity of federal elections[2] and has endeavored ever since to ensure individuals equal access to the political marketplace.[3] On the heels of the Watergate revelations of

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1. *See* THE FEDERALIST NO. 57, at 385 (James Madison) (Jacob E. Cooke ed., 1961). Who are to be the electors of the Federal Representatives? Not the rich more than the poor; not the learned more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscure and unpropitious fortune. The electors are to be the great body of the people of the United States....

Id.

2. *See* Act of Jan. 26, 1907 (Tillman Act), ch. 420, 34 Stat. 864 (limiting contributions made to federal elections candidates by national banks and corporations). The Tillman Act was a result of Theodore Roosevelt's efforts to minimize the corruptive effects of large corporate contributions in federal elections. *See* Kirk J. Nahra, *Political Parties and the Campaign Finance Laws: Dilemmas, Concerns and Opportunities,* 56 FORDHAM L. REV. 53, 60 (1987).

3. For example, in 1910 and 1911, Congress added disclosure requirements for federal candidates. *See* Act of June 25, 1910, ch. 392, 36 Stat. 822 (requiring post-election disclosure of campaign contributions), *amended by* Act of Aug. 19, 1911, ch. 33, § 2, 37 Stat. 25, 26-29 (requiring pre-election disclosure). In 1925, Congress passed the Federal Corrupt Practices Act (the "FCPA"), ch. 368, tit. 3, § 301, 43 Stat. 1070, 1070 (1925), *repealed by* Federal Elections Campaign Act of 1971, Pub. L. No. 92-225, § 405, 86 Stat. 3, 20 (1972), which limited expenditures of congressional and senatorial candidates, required itemized reports of all contributions and expenditures received by candidates, and strengthened existing limits on corporate spending. The FCPA consolidated previous election law under one act and was more a "general housekeeping measure" than it was a significant change from existing legislation. *See* 1 ROBERT F. BAUER & DORIS M. KAFKA, UNITED STATES FEDERAL ELECTION LAW: FEDERAL REGULATION OF POLITICAL CAMPAIGN FINANCE AND PARTICIPATION, booklet 2, at 4 (1984). The Hatch Act and the Hatch Act Amendments prohibited the political activities of federal and state employees, restricted categories of contributors, and limited the amount individuals in certain circumstances could contribute to federal campaigns. *See* Act of Aug. 2, 1939 (Hatch Act), ch. 410, 53 Stat. 1147 (codified at scattered sections of 5 & 18 U.S.C. (1994)), *amended by* Act of July 19, 1940 (Hatch Act Amendments), ch. 640, 54 Stat. 767. The Presidential Election Campaign Fund Act, Pub. L. No. 92-178, 85 Stat. 562-74 (1971) (codified as amended at 26 U.S.C. §§ 9001-42 (1994)), provided for the public financing of presidential and vice-presidential candidates. The Federal Election Campaign Act of

corrupt campaign practices, Congress attempted to stem corruption's detrimental effects upon the public's confidence in the electoral process by enacting the Federal Election Campaign Act Amendments of 1974 (the "FECA Amendments").[4] In 1976, in *Buckley v. Valeo*,[5] the Supreme Court reviewed the FECA Amendments in light

1971, Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended at 2 U.S.C. §§ 431-55 (1994)), replaced the FCPA, placing limits on contributions by a candidate to his own campaign, capping the amounts a candidate could spend on advertising, and broadening disclosure requirements. For a brief synopsis of the legislative history of federal elections laws, see 1 BAUER & KAFKA, *supra*, booklet 2, at 2-7; Nahra, *supra* note 2, at 58-67. *See generally* ROBERT E. MUTCH, CAMPAIGNS, CONGRESS, AND COURTS: THE MAKING OF FEDERAL CAMPAIGN FINANCE LAW 1-51 (1988) (discussing the history of federal campaign regulations from 1904 to Watergate); GEORGE THAYER, WHO SHAKES THE MONEY TREE? AMERICAN CAMPAIGN FINANCING PRACTICES FROM 1789 TO THE PRESENT 24-122 (1973) (examining in practical terms the role money plays in politics, and the history and nature of campaign finance regulations and practices).

4. *See* Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (codified in scattered sections of 2, 5, 18, 26, & 47 U.S.C. (1994)). The FECA Amendments of 1974 were the most comprehensive federal election legislation in the history of the United States. *See* S. REP. NO. 93-689, at 1 (1974), *reprinted in* 1974 U.S.S.C.A.N. 5587, 5587 (describing the FECA Amendments as "far-reaching"); Marlene Arnold Nicholson, Buckley v. Valeo*: The Constitutionality of the Federal Election Campaign Act Amendments of 1974*, 1977 WIS. L. REV. 323, 323 (characterizing the FECA Amendments as the most comprehensive campaign reforms in history); Daniel D. Polsby, Buckley v. Valeo*: The Special Nature of Political Speech*, 1976 SUP. CT. REV. 1, 2 ("[T]he FECA amendments are the most ambitious and thoroughgoing reforms of the election process ever enacted by Congress." (footnote omitted)). The FECA Amendments of 1974, *inter alia*, provided for the creation of a Federal Election Commission, provided limits on both contributions and expenditures, created public financing subsidies for presidential candidates, and included stricter disclosure requirements. *See* Federal Election Campaign Act Amendments of 1974, 2 U.S.C. §§ 431-55 (1994); HERBERT E. ALEXANDER, FINANCING POLITICS: MONEY, ELECTIONS AND POLITICAL REFORM 274-75 (1976) (listing the provisions of the FECA Amendments); Joel L. Fleishman, *The 1974 Federal Election Campaign Act Amendments: The Shortcomings of Good Intentions*, 1975 DUKE L.J. 851, 854-62.

The FECA Amendments were enacted largely in response to the improprieties of Richard Nixon's 1972 election campaign. *See* Jo Freeman, *Political Party Contributions and Expenditures Under the Federal Election Campaign Act: Anomalies and Unfinished Business*, 4 PACE L. REV. 267, 267 (1984) (noting that abuses uncovered during the Watergate hearings led to the FECA Amendments); Nahra, *supra* note 2, at 66 ("As a result of the tremors Watergate sent throughout the country, the final form of the 1974 amendments tilted toward a more extensive regulation of the campaign structures."); *see also* S. REP. NO. 93-689, at 2 (1974), *reprinted in* 1974 U.S.S.C.A.N. at 5588 (listing problems of the then-current system). One commentator has suggested that the FECA Amendments are "in a sense a major legacy of [Nixon's] administration. Just as the growing malaise and restlessness of the electorate through the Vietnam period made sweeping reform of federal elections possible, Watergate and its extraordinary transpirations made it necessary." Polsby, *supra*, at 1. *See generally* RALPH K. WINTER, WATERGATE AND THE LAW: POLITICAL CAMPAIGNS AND PRESIDENTIAL POWER 5-52 (1974) (examining the impact of Watergate on campaign financing and evaluating the legitimacy of present and proposed reform legislation).

5. 424 U.S. 1 (1976) (per curiam).

of the First Amendment guarantees of free speech and association.[6] However, the Court's piecemeal approach, upholding some provisions of the legislation and striking down others, has undermined Congress's attempt to provide a balance between the potential evils of corruption and protection of First Amendment rights.[7] Despite recognizing Congress's power to regulate federal elections and the government's vital interest in preventing both the appearance and reality of corruption in campaigns,[8] the Court's decision prevented Congress from using its power[9] to achieve either end.[10]

In *Colorado Republican Federal Campaign Committee v. Federal Election Commission*,[11] the Supreme Court was presented with an opportunity to reexamine its election law jurisprudence and address the validity of campaign finance laws in the context of political party

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6. *See id.* at 23.

7. *See* Nahra, *supra* note 2, at 76; *see also Buckley*, 424 U.S. at 254 (Burger, C.J., concurring in part and dissenting in part) (stating that the Court's decision failed "to give adequate consideration to the nature of this legislation"). In *Buckley*, the Court upheld limits on the amount of money a person could contribute to a candidate's campaign, but struck down limits on the amount of money a person could spend independently. *See id.* at 26, 45; *infra* notes 106-17 and accompanying text (discussing *Buckley* and the differences between contributions and expenditures). The Court asserted that the spending of money is more analogous to speech than to conduct, *see Buckley*, 424 U.S. at 15-17, and concluded that expenditure limits violated the First Amendment's freedom of speech because they restrained a person's ability to advocate political views, *see id.* at 48.

According to Nahra, the *Buckley* decision "wins no prize for either logic or foresight" and the Court failed to thoroughly consider "the impact of its actions on the financing structure set up by Congress." Nahra, *supra* note 2, at 55. Polsby characterized the decision as a political one, not resting on a "single, coherent view of free speech"; the Court sought to find "a middle way between the extremes of the FECA amendments and no election reform at all." Polsby, *supra* note 4, at 17; *see also* Lillian R. BeVier, *Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform*, 73 CAL. L. REV. 1045, 1058 (1985) (discussing the difficulty the Court had in drawing the line between conduct and speech).

8. *See Buckley*, 424 U.S. at 25-27, 45.

9. Congress is empowered to regulate federal elections under Article IV of the Constitution. *See* U.S. CONST. art. I, § 4, cl. 1 ("The Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof, but the Congress may at any time by Law make or alter such Regulations ....").

10. The Supreme Court eviscerated the effect of the FECA Amendments by creating loopholes through which individuals, corporations, and other organizations could circumvent campaign spending limits. *See* Federal Election Comm'n v. National Conservative Political Action Comm., 470 U.S. 480, 510 (1985) (White, J., dissenting); *id.* at 520 (Marshall, J., dissenting); *Buckley*, 424 U.S. at 261 (White, J., concurring in part and dissenting in part). For example, in *Buckley* Justice White argued that it is illogical to limit contributions while allowing a person to spend independently unlimited sums of money on a candidate's behalf. *See id.* (White, J., concurring in part and dissenting in part).

11. 116 S. Ct. 2309 (1996).

spending. In a plurality opinion, the Court held that § 441a(d)(3) of FECA,[12] a provision limiting political party expenditures,[13] did not apply to radio advertisements purchased by the Colorado Republican Federal Campaign Committee ("CRFCC") because those expenditures were not made in coordination with a federal candidate.[14] The plurality declined to reach the broader question of whether the provision's limit on coordinated expenditures was unconstitutional on its face.[15] However, the concurring and dissenting Justices intensely debated the issue.[16] Thus, *Colorado Republican* is significant not merely because a majority of Justices agreed that FECA does not and cannot restrict a political party's right to spend independently.[17] Rather, the importance of *Colorado Republican* is its representation of the Court's dissatisfaction with the *Buckley* framework and its indication that political party contribution and expenditure limits infringe the First Amendment rights of speech and association too severely to stand.[18]

An understanding of the opinions in *Colorado Republican* is facilitated by familiarity with the structure and terms of campaign finance laws. Therefore, this Note first briefly discusses the basic framework of the campaign finance laws, concentrating on private financing and the distinctions between contributions and expenditures.[19] The Note next discusses the facts of *Colorado Republican*, the lower court decisions, and the various opinions of the Supreme Court Justices.[20] The Note then reviews the Supreme Court's analysis of FECA in light of the First Amendment, beginning with its treatment of political speech in federal elections.[21] Thereafter, the Note examines the Court's views regarding the societal value of speech, focusing especially on the perceived role of political parties

12. Hereinafter, unless otherwise noted, use of "FECA" in this Note will refer to FECA of 1971 as amended and currently codified at 2 U.S.C. §§ 431-55 (1994).

13. *See infra* notes 28-30 and accompanying text (quoting statutory definitions of "contributions," "independent expenditures," and "coordinated expenditures").

14. *See Colorado Republican*, 116 S. Ct. at 2312.

15. *See id.* at 2320-21.

16. *See id.* at 2321 (Kennedy, J., concurring in the judgment and dissenting in part); *id.* at 2323 (Thomas, J., concurring in the judgment and dissenting in part); *id.* at 2332 (Stevens, J., dissenting).

17. *See id.* at 2316.

18. *See infra* notes 178-253 and accompanying text.

19. *See infra* notes 25-36 and accompanying text.

20. *See infra* notes 37-96 and accompanying text.

21. *See infra* notes 97-141 and accompanying text.

in disseminating political ideals.[22] After briefly examining the plurality's resolution of the statutory issue,[23] the Note examines the legitimacy of the Court's distinction between contributions and expenditures, the impact of that distinction upon national political parties, and whether the campaign finance laws as they exist or may come to exist have any practical effect.[24]

Campaign finance law permits a candidate for federal office to raise funds either through public or private financing.[25] A conceptual understanding of private financing, albeit a simplistic one, can be achieved by addressing three fundamental questions: Who is entitled to spend money in federal elections? In what ways are they entitled to spend? How much are they entitled to spend? Presently, FECA allows any person or multicandidate political committee[26] to privately finance a candidate's election campaign.[27] A person or multicandidate political committee may spend that money by making a campaign *contribution*, a campaign *expenditure*, or both.[28] Expen-

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22. *See infra* notes 142-68 and accompanying text.

23. *See infra* notes 169-82 and accompanying text.

24. *See infra* notes 183-258 and accompanying text.

25. The laws governing public campaign finance are beyond the scope of this Note and will not be discussed. For an overview of the public financing scheme, see generally 1 BAUER & KAFKA, *supra* note 3, booklet 5, at 19-53. One should be aware, however, that a candidate's acceptance of public financing is essentially contingent on the candidate's refusal to finance his campaign with private funds. *See* 26 U.S.C. § 9003(b)(2) (1994). Although designed to eliminate the perceived evils of private financing, in practice, private funds may still be used to support a candidate's election under a primarily public financing scheme. *See* 1 BAUER & KAFKA, *supra* note 3, booklet 5, at 44-45 (discussing a FECA provision that, in some circumstances, allows national, state, and local committees to expend funds on behalf of presidential and vice-presidential candidates).

26. FECA broadly defines the word "person" as "an individual, partnership, committee, association, corporation, labor organization, or any other organization or group of persons." 2 U.S.C. § 431(11) (1994). FECA defines "multicandidate political committee" as a registered political committee "which has received contributions from more than 50 persons, and, except for any State political party organization, has made contributions to 5 or more candidates for Federal office." *Id.* § 441a(a)(4). A political committee is established when an organization either receives contributions exceeding $1,000 or makes expenditures in excess of that amount. *See id.* § 431(4)(A). A corporation cannot spend corporate funds in connection with a candidate's election, but may establish a separate segregated fund, commonly referred to as a "political action committee" ("PAC"). *See id.* § 441b(b)(2)(C). PACs automatically qualify as political committees regardless of whether they meet the multicandidate political committee threshold requirements. *See id.* § 431(4)(B). Hereinafter, this Note will use "persons," "multicandidate political committees," "political committees," and "PACs" in a manner consistent with these definitions.

27. *See id.* § 441a.

28. FECA defines the term "contribution" as

> any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office;

ditures may be either independent[29] or coordinated; however, coordinated expenditures—those made in "cooperation, consultation, or concert" with a candidate—are considered contributions and are limited as such.[30] Persons or multicandidate political committees are prohibited from making direct contributions that exceed specified annual and aggregate limits.[31] However, limits initially placed by

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> or ... the payment by any person of compensation for the personal services of another person which are rendered to a political committee without charge for any purpose.

Id. § 431(8)(A). FECA defines the term "expenditure" as "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office." *Id.* § 431(9)(A)(i). FECA expressly excludes certain activities and services from being considered as either contributions or expenditures. *See id.* §§ 431(8)(B), 431(9)(B).

29. An "independent expenditure" is

> an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate which is made without cooperation or consultation with any candidate, or any authorized committee or agent of such candidate, and which is not made in concert with, or at the request or suggestion of, any candidate, or any authorized committee or agent of such candidate.

Id. § 431(17). The phrase "clearly identified" means that "the name of the candidate appears; ... a photograph or drawing of the candidate appears; or ... the identity of the candidate is apparent by unambiguous reference." *Id.* § 431(18). The Supreme Court has defined political spending "in connection with" a candidate as "express advocacy," but only in the context of corporate campaign spending. *See* Federal Election Comm'n v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 248-50 (1986). The Colorado district court and the Tenth Circuit disagreed as to whether that same definition applied to provisions limiting political party spending. *See infra* notes 49-62 and accompanying text.

30. *See* 2 U.S.C. § 441a(a)(7)(B)(i) ("[E]xpenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate.").

31. FECA states:

> (a) Dollar limits on contributions.
>
> (1) No person shall make contributions—
>
> (A) to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed $1,000;
>
> (B) to the political committees established and maintained by a national political party, which are not the authorized political committees of any candidate, in any calendar year which, in the aggregate, exceed $20,000; or
>
> (C) to any other political committee in any calendar year which, in the aggregate, exceed $5,000.
>
> (2) No multicandidate political committee shall make contributions—
>
> (A) to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed $5,000;
>
> (B) to the political committees established and maintained by a national political party, which are not the authorized political committees of any candidate, in any calendar year which, in the aggregate, exceed $15,000;

FECA on independent expenditures were held unconstitutional by the Supreme Court in *Buckley v. Valeo*[32] as a violation of the First Amendment rights of free speech and association.[33] To date, a person or multicandidate political committee is allowed to make unlimited independent expenditures.[34]

National and state committees of political parties may also make contributions and expenditures.[35] However, those committees are subject to a special provision (the "party expenditure provision") that precludes them from making an expenditure "in connection with the general election campaign of a candidate ... which exceeds [either] ... 2 cents multiplied by the voting age population of the State ... or $20,000."[36] In *Colorado Republican*, the constitutionality of this provision was challenged. The resolution of the issue involved discerning the nature of political parties as it relates to their First Amendment rights. In what ways are they similar to or different from other campaign spenders? Do those similarities or differences, if any, justify or necessitate disparate infringement of a political party's First Amendment rights?

In January of 1986, the CRFCC purchased radio advertisements attacking Timothy Wirth, the likely Democratic senatorial candidate in the fall elections.[37] The advertisements aired in early April, before

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or

(C) to any other political committee in any calendar year which, in the aggregate, exceed $5,000.

(3) No individual shall make contributions aggregating more than $25,000 in any calendar year.

Id. § 441a(a).

32. 424 U.S. 1 (1976) (per curiam).

33. *See id.* at 23.

34. *See id.*

35. *See* 2 U.S.C. § 441a(a)(4).

36. *Id.* § 441a(d)(3)(A).

37. *See Colorado Republican*, 116 S. Ct. at 2314. The text of the advertisements read as follows:

Paid for by the Colorado Republican State Central Committee.

Here in Colorado we're used to politicians who let you know where they stand, and I thought we could count on Tim Wirth to do the same. But the last few weeks have been a real eye-opener. I just saw some ads where Tim Wirth said he's for a strong defense and a balanced budget. But according to his record, Tim Wirth voted against every new weapon system in the last five years. And he voted against the balanced budget amendment.

Tim Wirth has a right to run for the Senate, but he doesn't have a right to change the facts.

Federal Election Comm'n v. Colorado Republican Fed. Campaign Comm., 839 F. Supp. 1448, 1451 (D. Colo. 1993), *rev'd*, 59 F.3d 1015 (10th Cir. 1995), *vacated*, 116 S. Ct. 2309 (1996).

the CRFCC had selected a candidate of its own,[38] and four months prior to the Democratic primary.[39] As required by statute,[40] the CRFCC filed a report with the Federal Election Commission ("FEC") listing all of its campaign expenditures.[41] The expenditure for the radio advertisements, however, was listed as an operating expense.[42] The Colorado Democratic Party filed a complaint with the FEC, asserting that the CRFCC violated FECA's party expenditure provision.[43] Under the statute, the CRFCC was eligible to spend $103,248 in the upcoming election;[44] however, it had already assigned that amount to the National Republican Party.[45] After settlement negotiations between the FEC and the CRFCC failed, the FEC initiated a civil action asserting that the CRFCC had violated § 441a(d)(3) by exceeding the statutory expenditure limits.[46] In response, the CRFCC maintained that the statute did not apply because the radio advertisements were not made "in connection

38. *See Colorado Republican*, 839 F. Supp. at 1451.

39. *See id.*

40. The Act requires that a report be filed with the Federal Election Commission disclosing "for any political committee other than an authorized committee . . . expenditures made under § 441a(d) of this title." 2 U.S.C. § 434(b)(4)(H)(iv).

41. *See Colorado Republican*, 839 F. Supp. at 1451.

42. *See id.*

43. *See Colorado Republican*, 116 S. Ct. at 2314.

44. A political party's coordinated expenditure limit is the greater of $20,000 times the Cost of Living Adjustment ("COLA") or two cents times the State Voting Age Population ("VAP") times the COLA. *See*, 22 FEDERAL ELECTION COMM'N REC. 1, 14 (1996). The Secretary of Commerce is required by FECA to publish an estimate of the VAP for each State in the Federal Register. *See* 2 U.S.C. § 441a(e). FECA also requires the Secretary of Labor to publish in the Federal Register, at the beginning of the calendar year, the percentage difference in the consumer price index for the preceding calendar year and the calendar year of 1974 (the "base period"). *See id.* § 441a(c). In 1986, the COLA was 2.181 and Colorado's VAP was 2.367 million. *See* Consumer Price Index for All Urban Consumers, United States City Average, 51 Fed. Reg. 5115 (Dep't of Labor 1986) (announcing that the consumer price index rose 118.1% from the 1974 base period to an annual average of 218.1% in 1985); Estimates of the Voting Age Population for 1985, 51 Fed. Reg. 10,418 (Dep't of Commerce 1986) (reporting the VAP estimates for all states); *see also*, 12 FEDERAL ELECTION COMM'N REC. 1, 1 (1986) (announcing 1986 coordinated expenditure limits for all states based on VAPs and a 2.181 COLA). Thus, the CRFCC was permitted to spend a total of $103,248.50, nearly $60,000 more than allowed under the alternative formula. *See id.*

45. *See Colorado Republican*, 116 S. Ct. at 2314. The Supreme Court had earlier ruled that a state party cannot constitutionally be prohibited from assigning its allotted amount under the party expenditure provision to a national senatorial campaign committee. *See* Federal Election Comm'n v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 31 (1981).

46. *See Colorado Republican*, 116 S. Ct. at 2314.

with" the general election of a federal candidate.[47] Additionally, the CRFCC filed a counterclaim, arguing that the party expenditure provision was facially unconstitutional because it violated the First Amendment guarantees of free speech and association.[48]

The United States District Court for the District of Colorado concluded that the expenditures were in fact coordinated.[49] Relying on both earlier Supreme Court precedent and the FEC's authority as primary interpreter of FECA, the district court asserted that under the current regulations political parties were incapable of making independent expenditures.[50] Under the Court's interpretation, any expenditure by a political party made "in connection with" the election of a federal candidate is subject to the statutory limits.[51] Consequently, the district court held that § 441a(d)(3) did not apply to the radio advertisements because expenditures are made "in connection with" a candidate's election only when they constitute "express advocacy."[52] Such expenditures would include words or phrases like "vote for," "elect," "Smith for Congress," or similar terms,[53] none of which appeared in the text of the CRFCC's adver-

47. *See id.*

48. *See id.*

49. *See* Federal Election Comm'n v. Colorado Republican Fed. Campaign Comm., 839 F. Supp. 1448, 1453 (D. Colo. 1993), *rev'd*, 59 F.3d 1015 (10th Cir. 1995), *vacated*, 116 S. Ct. 2309 (1996).

50. *See id.*; *see also infra* notes 169-71 and accompanying text (discussing Supreme Court decision and FEC advisory opinions rejecting political parties' ability to make independent expenditures).

51. *See* Buckley v. Valeo, 424 U.S. 1, 44 (1976) (per curiam).

52. *Id.* at 1454; *see also* Federal Election Comm'n v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 249 (1986) (stating that expenditure limits apply only to messages of express advocacy); *Buckley*, 424 U.S. at 44 (same); Federal Election Comm'n v. Furgatch, 807 F.2d 857, 860 (9th Cir. 1987) (same). The district court defined "advocacy" as speech constituting a clear plea for action. *See Colorado Republican*, 839 F. Supp. at 1455 (citing *Furgatch*, 807 F.2d at 864). The FEC urged the court to accept a broader definition of the "in connection with" language. *See id.* at 1454. The Commission cited FEC advisory opinions which stated that expenditures are made in connection with an election where they depict "a clearly identified candidate" or convey an " 'electioneering message.' " *Id.* (quoting FEC Advisory Opinion 1985-14, 2 Fed. Election Campaign Fin. Guide (CCH) ¶ 5819, at 11,185); *see also* Colorado Republican Fed. Campaign Comm. v. Federal Election Comm'n, 59 F.3d 1015, 1023 (10th Cir. 1995) (characterizing expenditures as those which " 'question or challenge the candidate's statements, position, or record' " (quoting FEC Advisory Opinion 1984-15, 1 Fed. Election Campaign Fin. Guide (CCH) ¶ 5766, at 11,069 (May 31, 1984))), *vacated*, 116 S. Ct. 2309 (1996).

53. *See Colorado Republican*, 839 F. Supp. at 1455; *see also Buckley*, 424 U.S. at 44 n.52 (stating that the use of such terms constitutes express advocacy). *But see Furgatch*, 807 F.2d at 863-64 (rejecting the use of "magic words" as a requisite for express advocacy, and instead implementing a three-part test to evaluate whether a message, read as a whole, constitutes express advocacy).

tisements.[54] Having resolved the controversy on statutory grounds, the district court dismissed the CRFCC's First Amendment-based counterclaim as moot.[55]

On appeal, the district court's judgment was reversed.[56] The United States Court of Appeals for the Tenth Circuit found no authoritative definition of the "in connection with" language in the context of the party expenditure provision.[57] It consequently accepted the FEC's broader definition[58] and held that the statute applied to the radio advertisements.[59] The Tenth Circuit then addressed and rejected the CRFCC's claim that the statute violated its First Amendment rights of free speech and association.[60] Because political party expenditures could potentially have corruptive effects on federal elections,[61] the Tenth Circuit concluded that the government's interest in limiting those expenditures was sufficiently compelling to justify some infringement of a political party's First

54. *See Colorado Republican*, 839 F. Supp. at 1455; *see also supra* note 37 (quoting the text of the advertisements). The district court stated that the advertisements, at best, dissuaded voters from supporting Timothy Wirth's candidacy; it was an indirect plea not rising to the level of specific action. *See Colorado Republican*, 839 F. Supp. at 1455.

55. *See Colorado Republican*, 839 F. Supp. at 1457.

56. *See Colorado Republican*, 59 F.3d at 1023.

57. *See id.* at 1021. The district court also found no "controlling or persuasive" authority defining the language used in § 441a(d)(3). *See Colorado Republican*, 839 F. Supp. at 1453. The definition relied on by the district court was taken from earlier Supreme Court decisions that interpreted the phrase "in connection with" in the context of § 441b(b)(2), a provision of FECA dealing with contribution and expenditure limits on corporations, banks, and labor organizations. *See id.* To justify its use of that definition, the district court employed general rules of statutory interpretation which assumed that identical terms used in separate but similar parts of the same act have the same meaning. *See id.* (citing Sullivan v. Stroop, 496 U.S. 478, 484 (1990); Sorenson v. Secretary of Treasury of the United States, 475 U.S. 851, 860 (1986); Barnson v. United States, 816 F.2d 549, 554 (10th Cir. 1987)). The Tenth Circuit maintained, however, that the terms did not necessarily have similar meanings because (1) the legislature had incorporated "express advocacy" into the definition of independent, but not coordinated, expenditures; and (2) FECA's different treatment of parties, persons, and multicandidate committees evidenced a possible difference in the application of the "in connection with" language. *See Colorado Republican*, 59 F.3d at 1021.

58. *See supra* note 52 (discussing the FEC's definition of "in connection with").

59. *See Colorado Republican*, 59 F.3d at 1022-23. In applying the broader definition, the Tenth Circuit considered the statute applicable because the advertisements named "both a clearly identified candidate and contained an electioneering message." *Id.* at 1023.

60. *See id.* at 1023-24.

61. The Tenth Circuit deferred to the legislative branch on the issue of whether party expenditures could corrupt federal elections. *See id.* at 1024 ("The members of Congress who enacted this law were surviving veterans of the election campaign process ... [and were] uniquely qualified to evaluate the risk of ... [actual or apparent] corruption from large coordinated expenditures by political parties.").

Amendment rights.[62]

The Supreme Court granted certiorari and vacated the judgment of the court of appeals.[63] Writing for the plurality,[64] Justice Breyer first observed that because the advertisements were developed and approved solely by the Party Chairman, read only by the Party's executive and political directors, and discussed at meetings attended only by Party staff, the expenditures were not coordinated, but independent.[65] Although Justice Breyer recognized the government's substantial interest in safeguarding the electoral process from the evils of corruption, he stated that this interest was not sufficiently compelling to justify limits on independent expenditures.[66] Such limits intrude upon core First Amendment freedoms of speech and association and significantly interfere with the ability to disseminate one's political ideals.[67]

Justice Breyer rejected the FEC's contentions that all party expenditures are coordinated as a matter of law and asserted that the evidence set forth by the FEC supporting such a presumption could not be construed as a factual determination that political parties were incapable of making independent expenditures.[68] He did not address

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62. *See id.*

63. *See Colorado Republican*, 116 S. Ct. at 2314-15.

64. Justice Breyer was joined by Justices O'Connor and Souter. *See id.* at 2312. Justice Kennedy wrote a separate opinion in which Chief Justice Rehnquist and Justice Scalia joined. *See id.* at 2321 (Kennedy, J., concurring in the judgment and dissenting in part). Justice Thomas wrote a separate opinion in which Chief Justice Rehnquist and Justice Scalia joined as to Parts I and III. *See id.* at 2323 (Thomas, J., concurring in the judgment and dissenting in part). Justice Stevens wrote a dissent in which Justice Ginsburg joined. *See id.* at 2332 (Stevens, J., dissenting).

65. *See id.* at 2315. Having decided that the expenditures in question were not coordinated, the Court did not need to decide whether they were made "in connection with" a candidate's election. The debate between the Tenth Circuit and the district court therefore remains unresolved. *See supra* notes 49-62 and accompanying text.

66. *See Colorado Republican*, 116 S. Ct. at 2316.

67. *See id.*; *see also* Buckley v. Valeo, 424 U.S. 1, 19 (1976) (per curiam) (asserting that expenditure limits "represent substantial . . . restraints on the quantity and diversity of political speech").

68. *See Colorado Republican*, 116 S. Ct. at 2316. Moreover, Justice Breyer implied that the existence of the evidence was more likely a result of the FEC's desire to sidestep previous Supreme Court decisions prohibiting limitations on expenditures. *See id.* at 2319. He argued that the FEC's characterization of such expenditures as being coordinated could not justify limitations on what would otherwise be considered independent expenditures. *See id.* Justice Breyer also rejected the argument that party expenditures were coordinated as a matter of law because the interests of a political party and its candidates were indistinguishable. *See id.* At best, he continued, the argument supports the removal of all expenditures, for "in that case one might argue that the absolute identity of views and interests eliminates any potential for corruption." *Id.*

whether the statute was unconstitutional on its face because he found that the issue was not sufficiently presented in the CRFCC's counterclaim, and the CRFCC's summary judgment affidavits did not indicate its intent to make such expenditures.[69] Although the Court had discretionary power to consider the claim, Justice Breyer stated that such review would be inappropriate, particularly where the controversy could be resolved on statutory grounds.[70]

In stark contrast, Justices Kennedy and Thomas would have addressed whether the party expenditure provision was unconstitutional on its face.[71] Both Justices agreed[72] that the CRFCC had sufficiently presented the issue for the Court's consideration.[73] According to Justice Thomas, the affidavits submitted by the CRFCC clearly addressed its desire to make coordinated expenditures and indicated that it hesitated to do so only because of the existing regulations.[74] He was critical of the plurality's reluctance to reach the constitutional question, stating that courts regularly evaluate the effects of legislation not part of the current dispute.[75] Justice Thomas argued that by avoiding the broader issue, the plurality unnecessarily prolonged the controversy.[76]

Although Justice Kennedy agreed that the CRFCC had asserted a facial challenge to § 441a(d)(3), his analysis differed from that of

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69. *See id.* at 2319-20.

70. *See id.* at 2320. Justice Breyer stressed the inappropriateness of reviewing complex constitutional issues before they are properly briefed and argued before the Court. *See id.* at 2321 ("In our view, given the important competing interests involved in campaign finance issues, we should proceed cautiously, consistent with ... precedent, and remand for further proceedings."); *see also infra* notes 176-82 and accompanying text (discussing further the plurality's reluctance to address the constitutional issue).

71. *See Colorado Republican*, 116 S. Ct. at 2321 (Kennedy, J., concurring in the judgment and dissenting in part); *id.* at 2323 (Thomas, J., concurring in the judgment and dissenting in part).

72. Although Justice Kennedy agreed with Justice Thomas's arguments, he did not join in any part of Justice Thomas's opinion. *See id.* at 2321 (Kennedy, J., concurring in the judgment and dissenting in part). For purposes of presenting their arguments, however, Justice Thomas's comments favoring the justiciability of the constitutional question should be understood to reflect the views of Justice Kennedy as well.

73. *See id.* at 2324 (Thomas, J., concurring in the judgment and dissenting in part).

74. *See id.* (Thomas, J., concurring in the judgment and dissenting in part).

75. *See id.* (Thomas, J., concurring in the judgment and dissenting in part).

76. *See id.* at 2325 (Thomas, J., concurring in the judgment and dissenting in part) (arguing that the only issue settled by the plurality's opinion was "whether [party] speech is protected by the First Amendment when the government can show—presumably with circumstantial evidence—a link between the Party and the candidate with respect to the speech in question").

Justice Thomas.[77] Justice Kennedy stated that the issue presented was a case of first impression and that past decisions had not considered the constitutionality of spending limits placed upon political parties.[78] He then argued that political parties serve a vital and unique role in American politics by furthering the political beliefs of their members.[79] Although Justice Kennedy conceded that political parties have interests that "transcend" those of their candidates, "in the context of particular elections, candidates are necessary to make the party's message known and effective."[80] Justice Kennedy asserted that the interests of a political party and its candidate are so "inextricably intertwined" that the speech of the party cannot be separated from that of the candidate "without constraining the party in advocating its most essential positions and pursuing its most basic goals."[81] This combination of identical interests and joint First Amendment activity between a political party and its candidate supports the conclusion that coordinated expenditure limits are indistinguishable from the independent expenditure limits that the Court found unconstitutional in *Buckley*.[82]

Unlike Justice Kennedy, Justice Thomas found no "constitutional significance" in the distinction between contributions and expenditures.[83] Although Justice Thomas conceded that the

77. *See id.* at 2322-23 (Kennedy, J., concurring in the judgment and dissenting in part). Although Justice Thomas rejected the *Buckley* framework, he agreed that coordinated party expenditure limits would be inapplicable even if the framework applied. *See id.* at 2330 (Thomas, J., concurring in the judgment and dissenting in part). That part of his opinion mirrors Justice Kennedy's arguments. *Compare id.* at 2323 (Kennedy, J., concurring in the judgment and dissenting in part) (stating that political party speech cannot be limited "without constraining the party in advocating its most essential positions and pursuing its most basic goals"), *with id.* at 2330-31 (Thomas, J., concurring in the judgment and dissenting in part) (arguing that the corruption rationale loses its force in the context of political party spending because the purpose of a political party is to influence its candidate's views).

78. *See id.* at 2322 (Kennedy, J., concurring in the judgment and dissenting in part). The *Buckley* Court considered whether spending limits on national or state political parties violate either the "First, Fifth, or Ninth Amendment or the Due Process Clause of the Fifth Amendment" and answered "[n]o, [only] as to the Fifth Amendment challenge advanced by appellants." Buckley v. Valeo, 424 U.S. 1, 59 n.67 (1976) (per curiam); *see also* Freeman, *supra* note 4, at 267 ("The Supreme Court left unanswered in *Buckley* . . . how its rationale pertains to political parties.").

79. *See Colorado Republican*, 116 S. Ct. at 2322 (Kennedy, J., concurring in the judgment and dissenting in part).

80. *Id.* (Kennedy, J., concurring in the judgment and dissenting in part).

81. *Id.* at 2323 (Kennedy, J., concurring in the judgment and dissenting in part).

82. *See id.* (Kennedy, J., concurring in the judgment and dissenting in part).

83. *See id.* at 2325 (Thomas, J., concurring in the judgment and dissenting in part). Justice Thomas advocated the justiciability of the broader question in Part I of his opinion.

equally protected, because like-minded individuals banding together often can voice their political beliefs more effectively.[100] With these considerations in mind, the Supreme Court has stated that "the First Amendment 'has its fullest and most urgent application' to speech uttered during a campaign for political office."[101] An equally important function of the First Amendment is protection of the right of individuals to form a political party for the purposes of advancing shared political beliefs.[102]

Though the Supreme Court has recognized that First Amendment rights are not absolute,[103] where legislation infringes upon political speech and association, the Court applies "exacting scrutiny."[104] Under this standard, a statute that violates the First Amendment cannot stand unless the government can demonstrate a sufficiently compelling interest and that the statute is narrowly tailored to achieve that end.[105] The Court's review of FECA in *Buckley* is a good illustration of the test. In *Buckley*, the Court first stated that contributions and independent expenditures are both forms of political speech broadly protected by the First Amendment.[106] It next identified a compelling government interest: the elimination of

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litical processes." *Mills*, 384 U.S. at 218-19.

100. *See* Shelton v. Tucker, 364 U.S. 479, 486 (1960) (noting that freedom of association is "closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society"); NAACP v. Alabama, 357 U.S. 449, 460 (1958) ("Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association . . . ."); *see also* Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 300 (1981) (recognizing the special relationship between the freedoms of speech and association and stating that "[t]he two rights overlap and blend; to limit the right of association places an impermissible restraint on the right of expression").

101. Eu v. San Francisco Democratic Cent. Comm., 489 U.S. 214, 223 (1989) (quoting Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971)).

102. *See* Morse v. Republican Party of Va., 116 S. Ct. 1186, 1237 (1996); Cousins v. Wigoda, 419 U.S. 477, 487 (1975).

103. *See* Buckley v. Valeo, 424 U.S. 1, 25 (1976) (per curiam) ("Even a 'significant interference' with protected rights . . . may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of . . . freedoms."); *see also Cousins*, 419 U.S. at 489 (noting that the state must have a compelling interest to justify infringement of First Amendment rights); NAACP v. Button, 371 U.S. 415, 438 (1963) (same); *Shelton*, 364 U.S. at 488 (same). *See generally* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF GOVERNMENT 25 (1948) ("The First Amendment, then, is not the guardian of unregulated talkativeness. It does not require that, on every occasion, every citizen shall take part in public debate . . . . What is essential is not that everyone shall speak, but that everything worth saying shall be said.").

104. McIntyre v. Ohio Elections Comm'n, 115 S. Ct. 1511, 1519 (1995).

105. *See id.*

106. *See Buckley*, 424 U.S. at 23.

corruption in federal elections.[107] Finally, the Court evaluated whether the government's interest was sufficiently compelling to justify the limits placed on contributions and expenditures.[108]

In applying strict scrutiny to evaluate these limits, the *Buckley* Court reached two different conclusions: It upheld FECA's contribution limits but struck down limits on expenditures.[109] Although the Court recognized that contributions and expenditures were both forms of political speech, it found them sufficiently different to warrant separate treatment.[110] According to the *Buckley* Court, a contribution is a non-specific expression of a person's political beliefs; although it expresses agreement with the candidate's views, it does not specifically identify which views or seek to expound upon those views.[111] Thus, limits on contributions do not significantly intrude on First Amendment rights because "[t]he quantity of communication by the contributor does not increase . . . with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing."[112] Additionally, contribution

107. *See id.* at 26. The *Buckley* Court additionally identified two "ancillary" interests, but held that consideration of those interests was unnecessary because the prevention of corruption was, by itself, sufficiently compelling. *See id.* at 25-26. One of these interests was the need to guarantee equal influence on election outcomes to all individuals, but "[t]he First Amendment's protection against governmental abridgment of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion." *Id.* at 49. Justice Marshall, in a separate opinion, suggested a significant connection between excessive spending by the wealthy in federal elections and lack of voter confidence in the integrity of that system. *See id.* at 288 (Marshall, J., concurring in part and dissenting in part). If preventing the appearance of corruption is a compelling interest, Justice Marshall's remarks may have been dismissed too readily. As one member of the judiciary has noted, "[p]olitical inequalities stemming from disparities in wealth have historically made Americans uneasy." J. Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 COLUM. L. REV. 609, 629 (1982).

108. *See Buckley*, 424 U.S. at 26-29, 45-49; *see also* Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 657-69 (1990) (providing an excellent example of the Court's use of strict scrutiny in evaluating the constitutionality of contribution and expenditure limits).

109. *See Buckley*, 424 U.S. at 26, 45.

110. *See id.* at 20-21. The *Buckley* distinction was upheld by a five-to-three margin; Justice Stevens took no part in the decision. *See id.* at 5. Subsequently, Justice Marshall, part of the *Buckley* majority, abandoned his support of that position. *See* Federal Election Comm'n v. National Conservative Political Action Comm., 470 U.S. 480, 519 (1985) (Marshall, J., dissenting). Chief Justice Rehnquist is the only member of the *Buckley* majority, *see Buckley*, 424 U.S. at 5, still on the Court.

111. *See Buckley*, 424 U.S. at 21.

112. *Id. But see* Fleishman, *supra* note 4, at 869 ("It is sophistry to argue that limiting the money one can spend on political speech is not the same thing as limiting the 'amount' of one's political speech."). Moreover, the Court noted that limits on contributions are a minor infringement because the speech involved is by someone other than the contributor.

limits do not violate freedom of association because the individual is not deprived of association with like-minded people.[113]

In contrast, expenditure limits represent a "substantial rather than merely theoretical restraint[] on the quantity and diversity of political speech."[114] Although FECA only limits expenditures directly advocating the election of a specific candidate, the Court held that candidate advocacy is as protected by the First Amendment as "abstract discussion" of political issues.[115] Moreover, the Court asserted that independent expenditures do not present the same threat of corruption as contributions because they do not necessarily aid the candidate in winning the election, and instead may prove counterproductive.[116] Consequently, the Court found that the government's interest in limiting expenditures was not as compelling as it's interest in limiting contributions.[117]

See Buckley, 424 U.S. at 20-21.

113. *See Buckley*, 424 U.S. at 22.

114. *Id.* at 19. "In other words, while expenditures are themselves 'speech,' and subject to something like absolute protection in the context of an election campaign, contributions are more nearly like 'association.' They do not express ideas but merely communicate a solidarity between the candidate and contributor." Polsby, *supra* note 4, at 21; *see also Buckley*, 424 U.S. at 244 (Burger, C.J., concurring in part and dissenting in part) (recognizing that *Buckley* treated contribution limits differently because they implicated the freedom of association rather than the freedom of speech).

115. *See Buckley*, 424 U.S. at 48.

116. *See id.* at 47. Although the Court implied that independent expenditures may harm a candidate's campaign, it provided no specific examples. *See id.*

117. *See id.* at 45. In a separate opinion, Chief Justice Burger asserted that the distinction between contributions and expenditures was logically flawed because it failed to acknowledge that each involved the same kind of political activity as the other. *See id.* at 243-44 (Burger, C.J., concurring in part and dissenting in part) ("[P]eople . . . spend money on political activity because they wish to communicate ideas, and their constitutional interest in doing so is precisely the same whether they or someone else utters the words."). Justice White also wrote a separate opinion and commented on the flawed logic of upholding contribution limits while simultaneously rejecting expenditure limits, since restrictions on expenditures prevent persons from circumventing the restrictions on contributions. *See id.* at 261 (White, J., concurring in part and dissenting in part). Despite agreeing that the distinction is not viable, Chief Justice Burger and Justice White reached entirely different conclusions. *Compare id.* at 241 (Burger, C.J., concurring in part and dissenting in part) (arguing that both contribution limits and expenditure limits violate the First Amendment), *with id.* at 261 (White, J., concurring in part and dissenting in part) (urging judicial deference to the legislative branch and contending that the government interest is sufficiently compelling to limit both contributions and expenditures); *see also* Federal Election Comm'n v. National Conservative Political Action Comm., 470 U.S. 480, 491 n.3 (1985) (noting the different conclusions reached by Chief Justice Burger and Justice White in *Buckley*). Justice White asserted that Congress has "more insight as to what may improperly influence candidates." *Buckley*, 424 U.S. at 261 (White, J., concurring in part and dissenting in part). One author has suggested that Justice White's analysis may have basis in fact because he was a member of President Kennedy's campaign. *See* Wright, *supra* note 107, at 612 ("Like the congressmen and senators—presumably more

Two later federal election cases applied the *Buckley* framework in more specific contexts, but it was not immediately clear whether the Court was applying strict scrutiny as well.[118] In *California Medical Association v. Federal Election Commission*,[119] the Court upheld a FECA provision which limited the amount a person could contribute to a multicandidate political committee.[120] The Court stated that such contributions were not direct forms of political advocacy, but instead were "speech by proxy"—political expression that constitutionally could be limited.[121] The concerns raised by Justice Blackmun, however, suggest that the majority faithfully adhered to the distinction in *Buckley* between contributions and expenditures without examining whether the contributions in dispute posed a real or apparent risk of corruption.[122]

In *Federal Election Commission v. National Right to Work Committee*,[123] the Court held that FECA's prohibition on corporate campaign contributions to multicandidate political parties does not violate the First Amendment.[124] After reviewing the history of legis-

knowledgeable than most about corruption in politics—who passed the 1974 Act, and unlike the other Justices, Justice White recognized and understood the realities of political campaigns.").

118. *See* Federal Election Comm'n v. National Right to Work Comm., 459 U.S. 197 (1982); California Med. Ass'n v. Federal Election Comm'n, 453 U.S. 182 (1981).

119. 453 U.S. 182 (1981).

120. *See id.* at 196-97. The California Medical Association ("CMA") was an unincorporated association of California physicians that founded the California Medical Political Action Committee ("CALPAC"), to which they contributed an amount greater than the $5,000 limit allowed under FECA. *See id.* at 185-86.

121. *Id.* at 201. The Court recognized that the CMA identified with the views of its political committee, but said that "this sympathy of interests alone does not convert CALPAC's speech into that of CMA." *Id.* at 196.

122. Justice Blackmun expressed concern for the Court's broad application of the *Buckley* framework and instead argued that *Buckley* requires application of strict scrutiny on a case-by-case basis. *See id.* at 202 (Blackmun, J., concurring in part and concurring in the judgment). He agreed with the outcome of the case only because multicandidate PACs that make contributions, like the CMA, may in effect serve as conduits to candidates and pose a legitimate risk of corruption. *See id.* at 203 (Blackmun, J., concurring in part and concurring in the judgment). However, Justice Blackmun asserted that he would not uphold the statute as applied to PACs created solely for the purpose of making independent expenditures because they would present no such danger. *See id.* (Blackmun, J., concurring in part and concurring in the judgment).

123. 459 U.S. 197 (1982).

124. *See id.* at 209-10. The National Right to Work Committee was a non-profit, nonstock corporation that solicited contributions from 267,000 non-members. *See id.* at 200. A corporation is prohibited from using general treasury funds to make contributions or expenditures in connection with federal elections. *See* 2 U.S.C. § 441b(a) (1994). However, a corporation may establish a separate segregated fund "to be utilized for political purposes," *id.* § 441b(b)(2)(C), if such funds are solicited from its stockholders or its members, *see id.* § 441b(b)(4)(A), (C).

lation regulating corporate spending,[125] the Court concluded that judicial deference was warranted where federal election laws revealed a legislative interest in the accounting of "the particular legal and economic attributes of corporations."[126] The decision is most notable for the Court's reluctance to apply strict scrutiny, at least in the context of corporate spending.[127] According to the Court, its role was not to "second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared."[128]

The Court, however, returned to a strict scrutiny analysis of spending limits in *Federal Election Commission v. National Conservative Political Action Committee.*[129] In *National Conservative PAC*, the Court struck down a provision of the Presidential Election Campaign Fund Act[130] which limited a PAC's expenditures in support of a candidate who had accepted public financing.[131] Even if the government had a sufficiently compelling interest in limiting PAC expenditures—which the Court held it did not[132]—the Court con-

125. *See National Right to Work*, 459 U.S. at 208; *see also* United States v. Automobile Workers, 352 U.S. 567, 570-584 (1957) (detailing the history of legislative attempts to regulate corporate and labor union political contributions).

126. *National Right to Work*, 459 U.S. at 209. The Court identified two sufficiently compelling interests underlying the FECA provisions. First, the provisions ensure that the special economic advantage a corporation receives is not converted into a political war chest to be used as quid pro quo in federal elections. Second, the provision aims to prohibit the spending of corporate assets to support a candidate whose views are contrary to the views of its shareholders. *See id.* at 207-08; Michael J. Garrison, *Corporate Political Speech, Campaign Spending, and First Amendment Doctrine*, 27 AM. BUS. L.J. 163, 191 (1989).

127. *See National Right to Work*, 459 U.S. at 210.

128. *Id.*

129. 470 U.S. 480 (1985); *see also* BeVier, *supra* note 7, at 1052 (noting that the Court reasserted strict scrutiny analysis of "corruption-prevention justifications").

130. 26 U.S.C. §§ 9002-42 (1994). Section 9012(f)(1) of the Presidential Election Campaign Fund Act stated:

> [I]t shall be unlawful for any political committee which is not an authorized committee with respect to the eligible candidates of a political party for President and Vice President in a presidential election knowingly and willfully to incur expenditures to further the election of such candidates, which would constitute qualified campaign expenses if incurred by an authorized committee of such candidates, in an aggregate amount exceeding $1,000.

Id. § 9012(f)(1).

131. *See National Conservative PAC*, 470 U.S. at 497. The National Conservative Political Action Committee ("NCPAC") was a non-profit, non-membership corporation. Its primary purpose was to influence the election of state and federal candidates either through contributions or expenditures. *See id.* at 490.

132. *See id.* at 497. The Court noted that there is a "hypothetical possibility" that PAC expenditures may undermine the electoral process, but stated that "[a] tendency to demonstrate distrust of PACs is not sufficient" to justify limitations on independent

cluded that § 9012(f) was not narrowly tailored to meet that end.[133] The statute applied not only to large political committees, but also to small neighborhood organizations that clearly posed no danger of corruption.[134] The "speech by proxy" rationale used by the Court in *California Medical* to justify contribution limits was distinguished; in that case, the members of the California Medical Association ("CMA") could still spend independently to express their political views, whereas the members of the National Conservative PAC had no recourse because of the statute's prohibition of independent expenditures.[135] The Court also distinguished the deferential approach used in *National Right to Work*, stating that deference to the legislative branch was not proper where a preemptive rule "indiscriminately lumps with corporations any 'committee, association or organization.' "[136]

An additional illustration of the Court's return to strict scrutiny

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expenditures. *Id.* at 498-99.

133. *See id.* at 501.

134. *See id.* at 498. The Court recognized that the provision criminalized only the spending of money to convey ideas, and not the expression of the ideas themselves, but stated that given the expense of presenting one's views on a national scale, limiting expenditures was like "allowing a speaker in a public hall to express his views while denying him the use of an amplifying system." *Id.* at 493. *But see id.* at 508 (White, J., dissenting) ("The First Amendment protects the right to speak, not the right to spend, and limitations on the amount of money that can be spent are not the same as restrictions on speaking."); Paul A. Freund, *Commentary* to ALBERT J. ROSENTHAL, FEDERAL REGULATION OF CAMPAIGN FINANCE: SOME CONSTITUTIONAL QUESTIONS 72 (1972) ("The right to speak is . . . more central to the values envisaged by the First Amendment than the right to spend. . . . [J]ust as the volume of sound may be limited by law, so the value of dollars may be limited . . . ."). *See generally* J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001, 1019 (1976) (criticizing the *Buckley* characterization of campaign spending as pure speech and concluding that it is a form of conduct related to speech).

135. *See National Conservative PAC*, 470 U.S. at 494-95. The NCPAC could not make contributions because a candidate accepting public funds under the Presidential Election Campaign Act was prohibited from accepting contributions to defray campaign expenses. *See* 26 U.S.C. § 9012(d). Additionally, the speech at issue in *National Conservative PAC* was not speech by proxy because the contributors and the political committee shared identical interests and the committee was expressing shared views. *See National Conservative PAC*, 470 U.S. at 495.

136. *National Conservative PAC*, 470 U.S. at 500. The Court distinguished the deferential approach used in *National Right to Work* because that decision rested upon the historical treatment of corporations under election law. *See id.* at 495; *see also* BeVier, *supra* note 7, at 1084 (attributing the Court's shift in deference to its belief that preemptive measures were warranted only where " 'the evil of potential corruption had long been recognized' " (quoting *National Conservative PAC*, 470 U.S. at 500)). The case was also distinguishable from *First National Bank v. Bellotti*, 435 U.S. 765 (1978), because the Court never considered whether a corporation could be prohibited from making independent expenditures. *See National Conservative PAC*, 470 U.S. at 495-96; *see also infra* notes 142-48 and accompanying text (discussing *Bellotti*).

analysis of spending limits is its decision in *Federal Election Commission v. Massachusetts Citizens For Life, Inc.*[137] In that case, the Court held that restrictions on corporate expenditures expressly advocating the election of a specific candidate do not apply to non-profit, non-stock corporations.[138] The Court held that FECA burdened speech by forcing non-stock corporations to establish a separate, segregated fund that involved substantial administrative responsibilities too burdensome for small corporations to bear.[139] Consequently, the regulations infringed the First Amendment rights of the Massachusetts Citizens For Life ("MCFL") by discouraging the express advocacy of its political beliefs.[140] The Court concluded that because MCFL was created only to express specific political views, did not pay dividends to any persons, and was not formed by another corporation or labor union, the contributions did not present a threat to the integrity of the electoral process.[141]

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137. 479 U.S. 238 (1986).

138. *See id.* at 263. Massachusetts Citizens For Life ("MCFL") used treasury funds to distribute a "special edition" publication endorsing pro-life candidates. *See id.* at 241-43. FECA prohibits corporations from using assets to make expenditures "in connection with" federal elections. *See* 2 U.S.C. § 441b(a) (1994).

139. *See Massachusetts Citizens For Life*, 479 U.S. at 253-56.

140. *See id.* at 255.

141. *See id.* at 264. In corporation cases, the Court has expressed concern over the use of political war chests amassed as a result of the economic privileges enjoyed by corporations. *See supra* note 126 and accompanying text. *See generally* Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 658-59 (1990) (discussing the specific benefits given to corporations by states). But the MCFL "was formed to disseminate political ideas, not to amass capital. The resources it has available are not a function of its success in the economic marketplace, but its popularity in the political marketplace." *Massachusetts Citizens For Life*, 479 U.S. at 259. The Court noted that the MCFL did not even accept contributions from other corporations or labor unions. *See id.* at 264. In distinguishing traditional corporations from the MCFL, the Court stated: "We have consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending." *Id.* at 259-60. However, this is not entirely accurate. While the justification is the same, the difference is that the speech sought to be protected was indirect speech by proxy. *See* California Med. Ass'n v. Federal Election Comm'n, 453 U.S. 182, 202 (1980) (Blackmun, J., concurring in part and concurring in the judgment) (disagreeing that the *Buckley* decision rests on "the premise that the First Amendment test to be applied to contribution limitations is different from the test applicable to expenditure limitations").

The holding in *Massachusetts Citizens For Life* was subsequently limited by the Court's decision in *Austin*. *Austin* involved the Michigan Chamber of Commerce ("MCC"), a non-profit corporation consisting of 8,000 members, three-quarters of which were for-profit corporations. *See Austin*, 494 U.S. at 656. The MCC sought to use general treasury assets to make both contributions and expenditures in connection with the election of a state candidate. *See id.* A Michigan statute, however, prohibited the MCC from doing so. *See id.* at 655. Relying on the Court's decision in *Massachusetts Citizens For Life*, the MCC argued that the statute was not applicable to non-profit corporations. *See*

The Supreme Court is not only concerned with a person's right to speak, but has displayed equal concern with that person's right to hear.[142] In *First National Bank v. Bellotti*,[143] the Court struck down a Massachusetts statute prohibiting corporate expenditures made in connection with referenda unrelated to the economic interest of the corporation.[144] The Court rejected the notion that a state's interest in preventing corruption was applicable to referenda, and stated that there was no evidence that corporate participation in such debates had any significant coercive effects on their outcome.[145] *Bellotti* was premised on the inherent societal value of political speech, the very purpose of which is to provide greater access to information on a wider range of political issues.[146] The Court stated that this kind of speech is essential to the democratic process and is not less valuable merely because it comes from a corporation rather than an individual.[147] Ultimately, the Court protected corporate speech "not because the corporation has a right to participate in the political process . . . but rather because the public has a right to hear corpo-

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id. at 661. However, the Court construed the precedent narrowly and distinguished the MCC from the MCFL on three grounds: First, the MCC was formed in part to conduct ordinary business purposes, including training and education of its members and the dissemination of social, civic, and economic information. *See id.* at 662. Second, corporate members with political views contrary to those advocated by the MCC might be reluctant to revoke their memberships and deprive their businesses of the non-political benefits of associating with other members of the business community. *See id.* at 663. Finally, unlike the MCFL, the MCC's relationship with for-profit corporations was such that the MCC could be used by those corporations as a means to circumvent the statute. *See id.* at 664.

142. *See* First Nat'l Bank v. Bellotti, 435 U.S. 765, 783 (1978); *see also* Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 297-99 (1981) (relying on *Bellotti* to strike down an ordinance limiting contributions of committees supporting or opposing ballot measures); Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 533, 541-42 (1980) (overturning a regulation prohibiting public utility companies from placing inserts regarding public issues in their monthly bills).

143. 435 U.S. 765 (1978).

144. *See id.* at 767-68.

145. *See id.* at 789-90. The Court expressly reserved the question of whether that interest would be sufficiently compelling if evidence proving corruption was presented. *See id.* at 789.

146. *See* Garrison, *supra* note 126, at 163, 181 (noting that the *Bellotti* decision is "premised on the capacity of political ideas and thought to provide the public with the information necessary for intelligent decisions in the democratic process"); *see also* Lillian R. BeVier, *Justice Powell and the First Amendment's "Societal Function": A Preliminary Analysis*, 68 VA. L. REV. 177, 188-201 (1982) (discussing Justice Powell's distinction in *Bellotti* between "a process protective, societal function and an individual rights approach to the first amendment").

147. *See Bellotti*, 435 U.S. at 777 ("The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source . . . ."); *see also* Austin v. Michigan Chamber of Commerce, 494 U.S. 653, 657 (1990) (noting that corporate political speech is protected under the First Amendment).

rate opinions."[148]

On at least two occasions the Supreme Court has relied on *Bellotti*'s process-protective rationale to invalidate governmental attempts to regulate the internal operations of political parties.[149] In *Tashjian v. Republican Party of Connecticut*,[150] the Republican Party of Connecticut promulgated a rule allowing independent voters to vote in Republican primaries.[151] A Connecticut statute, however, prohibited unregistered members from voting in a party's primary.[152] The Court reaffirmed the validity of a state's interest in " 'fostering informed and educated expressions of the popular will in a general election,' "[153] and agreed that a political party endorsement of a candidate serves that purpose.[154] However, the Court rejected the argument that a state's interest in diminishing voter confusion was sufficiently compelling to justify an infringement of a party's First Amendment rights.[155] The statute at issue violated the political

148. Garrison, *supra* note 126, at 181; *see also* BeVier, *supra* note 146, at 195 (asserting that the *Bellotti* statute "undermined informed public decisionmaking"); John A. Gray, *Corporate Identity and Corporate Political Activities*, 21 AM. BUS. L.J. 439, 442 (1984) (positing that the societal right to know, rather than self-expression, was the principal rationale in *Bellotti*); Thomas R. Kiley, *PACing the Burger Court: The Corporate Right to Speak and the Public Right to Hear After* First National Bank v. Bellotti, 22 ARIZ. L. REV. 427, 429 (1980) (stating that *Bellotti* held that the public's right to receive information is a fundamental First Amendment right); Marlene Arnold Nicholson, *The Constitutionality of the Federal Restrictions on Corporate and Union Campaign Contributions and Expenditures*, 65 CORNELL L. REV. 945, 958 (1980) (noting that *Bellotti* focused on the rights of hearers).

149. *See* Eu v. San Francisco County Democratic Cent. Comm., 489 U.S. 214, 229 (1989) (invalidating a California statute prohibiting political parties from endorsing, supporting, or opposing any candidate for nomination in the primary elections); Tashjian v. Republican Party of Conn., 479 U.S. 208, 210-11 (1986) (overturning a Connecticut statute prohibiting individuals from voting in a political party primary if they were not registered with that party); Democratic Party v. Wisconsin *ex rel.* La Follette, 450 U.S. 107, 122 (1981) (striking down Wisconsin statute prohibiting unaffiliated persons from voting in party primaries). In *Eu*, the Court also struck down restrictions on party organization and composition, holding that state attempts to regulate the internal affairs of a political party violate freedom of association. *See Eu*, 489 U.S. at 229-30.

150. 479 U.S. 208 (1986).

151. *See id.* at 210.

152. *See id.* at 210-11.

153. *Id.* at 220 (quoting Anderson v. Celebrezze, 460 U.S. 780, 796 (1982)).

154. *See id.*

155. *See id.* at 221. The Court also found that the following state interests were not sufficiently compelling: protection of the electoral administration process, *see id.* at 217-18, curtailment of election raids by independent voters, *see id.* at 219, and the responsibility of party government, *see id.* at 222-25. Additionally, the Court rejected the argument that the party rule allowing independents to vote at their primaries invalidated the Qualification Clause. *See id.* at 225-29.

party's associational freedom[156] because it deprived the party and its members of the opportunity to broaden public participation[157] and to "inform themselves as to the level of support for the Party's candidates among a critical group of electors."[158]

In *Eu v. San Francisco County Democratic Central Committee*,[159] various county and state political committees challenged the constitutionality of a California statute that prohibited them from endorsing, supporting, or opposing candidates in a party primary.[160] The Court asserted that a statute prohibiting party endorsements of candidates prevents a political party from disseminating ideas and from expressing its agreement with a candidate's views or a candidate's qualifications.[161] By silencing political parties, the statute made it "possible for a candidate with views antithetical to those of her party . . . to win its primary."[162] Relying on *Tashjian*, the Court held that prohibitions on party endorsements infringe upon a party's freedom of association because they prevent the party from "promoting candidates 'at the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community.' "[163] Having concluded that the statute violated First Amendment rights, the Court found no interest sufficiently compelling to justify the government regulation

156. *See id.* at 229. Justice Scalia dissented and was joined by Chief Justice Rehnquist and Justice O'Connor. *See id.* at 234 (Scalia, J., dissenting). Justice Scalia argued that the right of political parties to select candidates "unquestionably implicates an associational freedom," but characterized the majority's decision as an exaggeration of that right where it was not, as in this case, "unconstitutionally impaired." *Id.* at 235-36 (Scalia, J., dissenting) (stating that independent voters do not form a meaningful "association" with political parties).

157. *See id.* at 214.

158. *Id.* at 221.

159. 489 U.S. 214 (1989).

160. *See id.* at 217.

161. *See id.* at 222-24.

162. *Id.* at 217; *see also id.* at 217-18 n.4 (noting, for example, that in 1980 "the Democratic Party's nomination for United States House of Representative[s] from the San Diego area . . . was a Grand Dragon of the Ku Klux Klan").

163. *Id.* at 224 (quoting *Tashjian*, 479 U.S. at 216); *see also* Brian L. Porto, *The Constitution and Political Parties: Supreme Court Jurisprudence and Its Implications for Partybuilding*, 8 CONST. COMMENTARY 433, 449 (1991) ("The [Court] has articulated a model of associational freedom that has greatly strengthened . . . political parties' capacity to govern themselves and to control the processes by which candidates are nominated for public office."). *But see* Daniel Hays Lowenstein, *Associational Rights of Major Political Parties: A Skeptical Inquiry*, 71 TEX. L. REV. 1741, 1743 (1993) (criticizing "the constitutional attacks on party regulation on the ground that such attacks are unlikely to promote the movement's objective of responsible party government and may often run counter to that goal").

on parties.[164]

The decisions in *Tashjian* and *Eu* reveal the Supreme Court's views regarding the inherent value of political parties and the significant role they play in American government,[165] a value that Congress itself, in the context of federal elections, recognizes and shares.[166] The Court's increased protection of political parties, combined with its growing disregard for campaign spending limits, has led a large minority of Justices to conclude that there exists no sufficiently compelling government interest that justifies limits on party expenditures.[167] Although *Colorado Republican* reaffirmed the distinction between contributions and expenditures, the strength of the *Buckley* framework was undermined and its validity is questionable, especially in the context of political party spending.[168]

An additional, but less interesting, question is whether the party expenditure provision should apply to the expenditures made by the CRFCC. To support the proposition that all party expenditures are presumed to be coordinated, and thus within the scope of FECA, the FEC cited the Supreme Court's statement in *Federal Election Commission v. Democratic Senatorial Campaign Committee*[169] that "[p]arty committees are considered incapable of making 'independent' expenditures."[170] The FEC also cited several FEC ad-

164. *See Eu*, 489 U.S. at 231-33. The Court also examined the statutory provisions regulating the internal structure and composition of the political parties and concluded that they too violated the parties' associational rights. *See id.* at 229.

165. The decisions strengthen political parties by providing them with the opportunity to "facilitate debate, compromise and the effective presentation of a common viewpoint." Porto, *supra* note 163, at 448. Porto contends that the Court leaves unanswered the question of whether the *Eu* and *Tashjian* decisions are "part of a comprehensive reorientation by the Court of its views concerning the proper scope of constitutional limitations on political parties." *Id.* at 449.

166. For example, in passing FECA, Congress sought to maintain the role of political parties in federal elections, stating that a "vigorous party system is vital to American politics." S. REP. NO. 93-689, at 7 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5587, 5593.

167. The minority includes Chief Justice Rehnquist and Justices Kennedy, Scalia, and Thomas. *See Colorado Republican*, 116 S. Ct. at 2321 (Kennedy, J., concurring in the judgment and dissenting in part); *id.* at 2323 (Thomas, J., concurring in the judgment and dissenting in part).

168. *See infra* notes 169-253 and accompanying text.

169. 454 U.S. 27 (1981).

170. *See Colorado Republican*, 116 S. Ct. at 2318 (citing *Democratic Senatorial Campaign Comm.*, 454 U.S. at 28-29 n.1). The footnote reads, in pertinent part:

> Expenditures by party committees are known as "coordinated" expenditures and are subject to the monetary limits of § 441a(d).... Party committees are considered incapable of making "independent" expenditures in connection with the campaigns of their party's candidates. The Commission has, by regulation, forbidden such "independent" expenditures by the national and state party

visory opinions[171] and one federal regulation.[172] Justice Breyer, however, characterized the footnote in *Democratic Senatorial* as dicta that "purported to describe the regulatory regime as the FEC had described it in a brief."[173] Further, the FEC advisory opinions and the federal regulation carried little weight because the presumption they established was undermined by the implication in one of the same advisory opinions that parties *can* make independent expenditures.[174] Although the party expenditure provision does not itself distinguish between independent and coordinated expenditures, Justice Breyer considered this indicative of the legislature's intent to limit *all* expenditures and found that the provision's failure to distinguish was not evidence of "a congressional judgment that such a distinction is impossible or untenable in the context of political party spending."[175]

If so, it is perhaps to Justice Breyer's credit, and Justices O'Connor's and Souter's as well, that despite any doubts regarding the statute's continued legitimacy they reserved judgment on the facial challenge to its constitutionality until the issue was addressed

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committees.

Democratic Senatorial Campaign Comm., 454 U.S. at 28-29 n.1) (citations omitted).

171. *See* FEC Advisory Opinion 1984-15, 1 Fed. Election Campaign Fin. Guide (CCH) ¶ 5766, at 11,069 (May 31, 1984) (using "coordinated" to describe the party expenditure limits); FEC Advisory Opinion 1988-22, 2 Fed. Election Campaign Fin. Guide (CCH) ¶ 5932, at 11,471 n.4 (July 5, 1988) (same); *see also id.* (stating that "coordination with candidates is presumed and 'independence' precluded").

172. *See* 11 C.F.R. § 110.7(b)(4) (1996) ("The party committees ... shall not make independent expenditures in connection with the general election campaign of candidates for Federal office.").

173. *Colorado Republican*, 116 S. Ct. at 2318.

174. *See id.* Justice Breyer cited the same advisory opinion that the FEC used to support its position. *See id.* That advisory opinion stated that "[a]lthough consultation or coordination with the candidate is permissible, it is not required." FEC Advisory Opinion 1984-15, 1 Fed. Election Campaign Fin. Guide (CCH) ¶ 5766, at 11,069 (May 31, 1984). The FEC argued that the advisory opinions were indicative of an "empirical judgment" that all party expenditures were coordinated. *See Colorado Republican*, 116 S. Ct. at 2318. But the statements appearing in the advisory opinions were "without any internal or external evidence that the FEC means it to embody an *empirical* judgment (say, that parties, in fact, hardly ever spend money independently) or to represent the outcome of an empirical investigation." *Id.* One commentator has noted that the FEC's presumption rested on its belief that parties and candidates were so closely related that they "could not make both co-ordinated and independent expenditures; that the consultation inherent in one would preempt the lack of consultation necessary to the other." Freeman, *supra* note 4, at 273. Freeman states that the presumption suggests that all parties have similar relationships with candidates and "ignores the very real difference in treatment by the FECA ... of local, state and national party committees." *Id.*

175. *Colorado Republican*, 116 S. Ct. at 2318; *see also supra* note 68 (discussing Justice Breyer's suggestion that the FEC was seeking to sidestep *Buckley* and its progeny).

appropriately by the parties. Coordinated expenditures are, in some instances, similar to independent expenditures; in turn, however, many expenditures are indistinguishable from contributions.[176] Individuals, political groups, and political action committees share some characteristics with political parties and, consequently, "a holding on in-fact coordinated party expenditures necessarily implicates a broader range of issues than may first appear, including the constitutionality of party contribution limits."[177] Justice Breyer's strict application of the *Buckley* framework is less a pronouncement of his support for that position than it is support for judicial restraint.[178] Justice Breyer declined to review the issue, not necessarily because

176. *See Colorado Republican*, 116 S. Ct. at 2320. For example, an individual could forego making a contribution to a candidate and instead pay for the candidate's expenses directly. *See id.*

177. *Id.* On remand, the Tenth Circuit provided a sample of the constitutional questions raised by the CRFCC's challenge:

> "For example, in what ways, if any, do coordinated expenditures by political parties differ from coordinated expenditures by individuals or nonparty political groups? In what ways are they similar? Are some party coordinated expenditures more like independent expenditures than like contributions? Are others more like contributions? . . . Do the interests of candidates who run under a particular party's label necessarily coincide with the interests of the party committees . . . that make coordinated expenditures . . . ? Do candidates participate in soliciting funds for party committees, and if so, does coordinated spending by party committees increase the opportunities for private contributors to the party to obtain a quid pro quo from a candidate?"

Federal Election Comm'n v. Colorado Republican Fed. Campaign Comm., 96 F.3d 471, 472-73 (10th Cir. 1996) (quoting Federal Election Commission's Response to Motion for Expedited Consideration at 9-10). Justice Breyer asserted that a greater and more immediate concern would be whether, if the Court struck down the party expenditure provision, political parties could thereafter make unlimited coordinated expenditures or instead would be subject to the same limits as other political committees. *See Colorado Republican*, 116 S. Ct. at 2320.

178. Justice Breyer cited *Renne v. Geary*, 501 U.S. 312 (1991), which stated that facial challenges should not generally be entertained when an "as-applied" challenge could resolve the controversy. *See Colorado Republican*, 116 S. Ct. at 2320; *see also* Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 502 (1985) (recognizing that the First Amendment does not require "invalidation of a statute further than necessary to dispose of the case before it"). The majority opinion in *Renne* was written by Justice Kennedy, who was joined by Chief Justice Rehnquist and Justices Stevens, O'Connor, Souter, and Scalia. *See Renne*, 501 U.S. at 313-14. Judicial restraint is, of course, not an uncommon position and perhaps was best articulated by Justice Brandeis in his concurring opinion in *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 345-348 (1936) (Brandeis, J., concurring). In *Ashwander*, Justice Brandeis outlined the governing rules of constitutional interpretation and stated that "[t]he Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of." *Id.* (Brandeis, J., concurring). *But see* Frederick Schauer, Ashwander *Revisited*, 1995 SUP. CT. REV. 71, 71-97 (questioning *Ashwander's* holding and examining whether statutory construction is less aggressive than constitutional review).

he believed the distinction between coordinated and independent expenditures was meaningful, but because coordinated expenditures as defined by FECA did not encompass the advertisements purchased by the CRFCC.[179] However, Justice Breyer also believed that identical interests between a political party and its candidate support the removal of coordinated expenditure limits.[180] This position is compatible with Justice Kennedy's arguments,[181] and is a possible indication of the decision Justices Breyer, O'Connor, and Souter may have reached had they decided the broader question.[182]

The basic philosophical difference separating Justice Kennedy's opinion from the opinions of Justice Thomas and Justice Stevens was that Justice Kennedy found no distinction between independent and coordinated party expenditures but apparently held that both are distinguishable from party contributions.[183] Justice Kennedy's opinion rests on the assertion that the speech of a political party is so "intertwined" with the speech of its candidate that application of strict scrutiny and the *Buckley* framework to limits on party expenditures cannot be overcome by any governmental interest.[184] He

179. *See Colorado Republican*, 116 S. Ct. at 2315; *see also supra* note 30 and accompanying text (defining "coordinated expenditure"). In contrast, Justice Breyer implied that Justice Thomas argued for an expedient resolution to the controversy simply because the Court had an opportunity to resolve it, rather than the means to resolve it wisely. *See Colorado Republican*, 116 S. Ct. at 2321.

180. *See Colorado Republican*, 116 S. Ct. at 2319; *see also* Freeman, *supra* note 4, at 289 ("If a party is incapable of acting independently from its candidates, is there necessarily the danger of corruption or the appearance of corruption that there is for individuals and non-party associations?").

181. *See infra* notes 189-203 and accompanying text.

182. Assuming Justice Thomas would concur, Justice Kennedy needs merely one more vote for his position to become the majority view. In light of Justice O'Connor's positions in earlier decisions, she seems the most likely to join Justice Kennedy. She did not object to the Court's reasoning in *Massachusetts Citizens For Life*, which struck down spending limits on corporations, and was a member of the majority in *National Conservative PAC*. *See* Federal Election Comm'n v. Massachusetts Citizens For Life, Inc., 479 U.S. 238, 265 (1986) (O'Connor, J., concurring in part and concurring in the judgment); Federal Election Comm'n v. National Conservative Political Action Comm., 470 U.S. 480, 482 (1985). Additionally, Justice O'Connor joined the majority in *Eu v. San Francisco County Democratic Comm.*, 489 U.S. 214, 215 (1989). And although she joined Justice Scalia's dissent in *Tashjian*, that opinion did not reject the majority's characterization of a political party's rights under the First Amendment. *See* Tashjian v. Republican Party of Conn., 479 U.S. 208, 235-36 (1986) (Scalia, J., dissenting). *See also supra* notes 150-58 and accompanying text (discussing *Tashjian*).

183. *See Colorado Republican*, 116 S. Ct. at 2323 (Kennedy, J., concurring in the judgment and dissenting in part).

184. *See id.* (Kennedy, J., concurring in the judgment and dissenting in part). Justice Kennedy noted that precedent had only examined contribution limits on individuals and associations, and the Court had yet to apply the weight of these decisions to political par-

argued that political parties play a unique role in facilitating " 'uninhibited, robust, and wide-open' " debate on political issues.[185] According to Justice Kennedy, one function of a political party is to identify individuals who collectively represent the interests of the party, limit the party to those individuals, and thereafter voice its collective interest by advocating the election of a candidate.[186] Thus, Justice Kennedy reasoned, political parties seek to elect a candidate who will advance their political ideals, and coordinated party expenditures are the basis for a party's support of its candidate.[187] It follows that little difference exists between whether the candidate or the party finances the campaign because the party's speech is so "inextricably intertwined" with its candidate's speech that the party-coordinated expenditures become "indistinguishable in substance" from the candidate's expenditures.[188]

Justice Kennedy's analysis is thus a pure application of the *Buckley* test, balancing First Amendment freedoms against a compelling governmental interest.[189] Because *Buckley* invalidated

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ties. *See id.* at 2322 (Kennedy, J., concurring in the judgment and dissenting in part); *see also supra* note 78 and accompanying text (characterizing *Colorado Republican* as a case of first impression).

185. *Colorado Republican*, 116 S. Ct. at 2322 (Kennedy, J., concurring in the judgment and dissenting in part) (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

186. *See id.* (Kennedy, J., concurring in the judgment and dissenting in part); *see also* David Adamany, *Political Finance and the American Political Parties*, 10 HASTINGS CONST. L.Q. 497, 500-05 (1983) (examining four political party activities that support the democratic process). Adamany states that political parties structure the vote and promote public awareness of political issues, reduce fragmentation of interests, "[recruit] political leaders," and "govern either by suppressing conflict and thus promoting stability or by formulating clear alternatives and converting them into public policy." *Id.* at 505; *see also* Larry J. Sabato, *PACs and Parties*, *in* MONEY, ELECTIONS, AND DEMOCRACY: REFORMING CONGRESSIONAL CAMPAIGN FINANCE 187, 193-96 (Margaret Latus Nugent & John R. Johannes eds., 1990) [hereinafter MONEY, ELECTIONS, AND DEMOCRACY] (discussing the purposes served by American political parties).

187. *See Colorado Republican*, 116 S. Ct. at 2323 (Kennedy, J., concurring in the judgment and dissenting in part).

188. *Id.* (Kennedy, J., concurring in the judgment and dissenting in part). Justice Kennedy recognized that in most cases party expenditures will be coordinated, but argued that, given the mutual interests between party and candidate, there is a greater justification for invalidating political party expenditure limits. *See id.* at 2322-23 (Kennedy, J., concurring in the judgment and dissenting in part).

189. *See id.* at 2322-23 (Kennedy, J., concurring in the judgment and dissenting in part). Justice Kennedy did not expressly invoke the *Buckley* test, but he clearly applied the same formula. His opinion emphasized the value of political debate that is protected by the First Amendment, identified the commonality of interests between parties and their candidates, argued that as a result party contributions and party expenditures are indistinguishable, and therefore concluded that the First Amendment prohibits any limitations. *See id.* (Kennedy, J., concurring in the judgment and dissenting in part); *cf.*

expenditure limits on candidates, it also invalidated limits on coordinated expenditures.[190] The opinion, however, is somewhat perplexing; by collapsing the distinction between independent and coordinated party expenditures, it becomes difficult to justify upholding party contribution limits.[191] Because FECA considers coordinated expenditures to *be* contributions,[192] if limits on the coordinated expenditures of a political party violate the First Amendment, contribution limits must be equally unconstitutional.[193] Nevertheless, Justice Kennedy suggested in dicta that Congress could in fact regulate party contributions.[194] By comparison, Justice Thomas applied the *Buckley* test and also failed to find that the government's interest in eliminating corruption sufficiently justified placing limits upon political parties; unlike Justice Kennedy, however, he expressly extended his conclusion to apply to all limits, including those on contributions.[195] Ultimately, Justice Kennedy's opinion can only be understood as an argument for removal of all limits on party spending.

The consequence of this conclusion is that political parties will be able to expend more funds on behalf of candidates, and arguably may do so more effectively.[196] Commentators have generally recog-

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California Med. Ass'n v. Federal Election Comm'n, 453 U.S. 182, 202 (1981) (Blackmun, J., concurring in part and concurring in the judgment) (advocating the use of a "rigorous standard of review" for election spending rather than application of general principles derived from *Buckley*). Application of an ad hoc test is consistent with the Court's decisions following *Buckley*. *See, e.g.*, Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 657-66 (1990); Federal Election Comm'n v. Massachusetts Citizens For Life, Inc., 479 U.S. 238, 251-63 (1986); First Nat'l Bank v. Bellotti, 435 U.S. 765, 784-95 (1978). *But see* Federal Election Comm'n v. National Right to Work Comm., 459 U.S. 197, 210 (1982) (deferring to the legislature's determination of the need for preemptive bans on corporate spending in federal elections).

190. *See Colorado Republican*, 116 S. Ct. at 2323 (Kennedy, J., concurring in the judgment and dissenting in part).

191. Justice Breyer recognized the potential for this problem and explained that it was one reason why he declined to decide the constitutional question. *See id.* at 2320.

192. *See* 2 U.S.C. § 441a(a)(7)(B)(i) (1994) ("[E]xpenditures made by any person in cooperation, consultation, or concert, with ... a candidate ... shall be considered to be a contribution....").

193. The Court in *Buckley* equated coordinated expenditures with contributions and held that limits on both were constitutional. *See* Buckley v. Valeo, 424 U.S. 1, 46-47 (1976) (per curiam).

194. *See Colorado Republican*, 116 S. Ct. at 2323 (Kennedy, J., concurring in the judgment and dissenting in part) ("Congress may have authority ... to restrict undifferentiated political party contributions which satisfy [the *Buckley* criteria], but that type of regulation is not at issue here.").

195. *See id.* (Thomas, J., concurring in the judgment and dissenting in part).

196. *See* Nahra, *supra* note 2, at 86-87.

nized the declining role of political parties in the electoral process,[197] while at the same time acknowledging the value of political parties in aggregating multiple interests and disseminating political views.[198] If one accepts the premise that a party does not present a threat to the integrity of the electoral process because a party has "no intrinsic existence outside of its candidates ... [and] can fulfill its goals and express its opinions only through its candidates,"[199] then unlimited party spending can serve to limit the dangers posed by other political groups. This is because the use of party funds "reduces the candidate's dependence on outside contributions and thereby counteracts the coercive pressures and attendant risks of abuse to which the Act's contribution limitations are directed."[200] Political parties differ from other political groups in that they serve multiple purposes and are not "ideological or narrowly bound to specific views."[201] Freeing political parties from FECA limits allows them to pursue those ends that are a fundamental aspect of American politics.[202] Therefore, if a candidate is elected as a result of party financing, and thereafter advocates that party's political views, "that is not corruption; that is successful advocacy of ideas in the political market-place and repre-

197. *See* Adamany, *supra* note 186, at 505-15 (examining the causes of and cures for party decline); Frank J. Sorauf, *Political Parties and Political Action Committees: Two Life Cycles*, 22 ARIZ. L. REV. 445, 446-59 (1980) (discussing political parties' "golden age," their subsequent decline, and factors contributing to that decline); *see also* ALEXANDER, *supra* note 4, at 196 (listing causes of the decline of parties other than federal election reform). Herbert Alexander and Brian Haggerty note elsewhere that there are conflicting views as to whether FECA was a contributor to party decline. *See* HERBERT E. ALEXANDER & BRIAN A. HAGGERTY, THE FEDERAL ELECTION CAMPAIGN ACT: AFTER A DECADE OF POLITICAL REFORM 91-93, 96 (1981).

198. *See* Sorauf, *supra* note 197, at 462-63; *cf.* ALEXANDER, *supra* note 4, at 265 ("Too many ideas of value to society would get lost without the organized participation of groups in electoral politics."). The value of political parties in disseminating political issues has already been recognized by the Supreme Court. *See supra* notes 149-66 and accompanying text (discussing *Tashjian* and *Eu*).

199. Nahra, *supra* note 2, at 102.

200. Buckley v. Valeo, 424 U.S. 1, 53 (1976) (per curiam); *see also* Nahra, *supra* note 2, at 109 (arguing that removal of political party spending limits will decrease a candidate's reliance on PACs).

201. Nahra, *supra* note 2, at 106.

202. *See id.* at 109; *see also supra* note 186 and accompanying text (discussing purposes of political parties). Adamany asserts that FECA is not directly responsible for the decline of political parties; however, campaign finance laws have indirectly allowed other "institutional competitors" to injure parties. *See* Adamany, *supra* note 186, at 563 ("The constitutionally mandated opportunity for ideological PACs to make unlimited independent expenditures gives them a competitive advantage over parties."). However, one should remember that the lack of limits on political action committees was a result of the *Buckley* decision and not an act of Congress.

sentative government in a party system."[203]

In his reluctant application of the *Buckley* framework, Justice Thomas argued that the government could not limit a party's coordinated expenditures.[204] But unlike Justice Kennedy, Justice Thomas expanded his analysis and argued that *all* spending limits violate the First Amendment.[205] However, it is difficult to justify his rejection of the *Buckley* framework as a whole. Justice Thomas not only failed to recognize the substantive difference between contributions and expenditures;[206] he also misapplied the strict scrutiny test, both by asserting that the government's interest must be protected by the least restrictive means[207] and by ignoring that the prevention of the appearance of corruption is by itself sufficiently compelling to justify spending limits.[208]

Justice Thomas first attacked the Court's "speech-by-proxy" rationale, arguing that both contributions and independent expenditures involve an intermediary[209]—"some go-between that facilitates the dissemination of the spender's message."[210] Additionally, he contended that contributions show more than general support and, like expenditures, are a valuable form of political expression.[211] However, his first assertion fails to undercut the "speech-by-proxy" rationale because the existence of a "go-between" does not diminish that person's control over the content of the political message, whereas contributors surrender any such control once they make the contribution.[212] Moreover, the Court has never denied that a contribution is a valuable political message; rather, it has

203. *Colorado Republican*, 116 S. Ct. at 2331 (Thomas, J., concurring in the judgment and dissenting in part); *see also* Freeman, *supra* note 4, at 290 ("The intent of most political activists and political associations is to influence the official acts of elected officials. In this effort the distinction between 'influence' and 'undue influence' is not very clear.").

204. *See Colorado Republican*, 116 S. Ct. at 2330-31 (Thomas, J., concurring in the judgment and dissenting in part).

205. *See id.* at 2328-29 (Thomas, J., concurring in the judgment and dissenting in part).

206. *See infra* notes 209-16 and accompanying text.

207. *See infra* notes 217-22 and accompanying text.

208. *See infra* notes 223-32 and accompanying text.

209. *See Colorado Republican*, 116 S. Ct. at 2327 (Thomas, J., concurring in the judgment and dissenting in part).

210. *Id.* (Thomas, J., concurring in the judgment and dissenting in part). By "go-between," Justice Thomas means, for example, "an advertising agency or a television station." *Id.* (Thomas, J., concurring in the judgment and dissenting in part).

211. *See id.* (Thomas, J., concurring in the judgment and dissenting in part).

212. *Cf.* Buckley v. Valeo, 424 U.S. 1, 46-47 (1976) (per curiam) (distinguishing between expenditures "controlled" by "would-be contributors," and those "controlled by or coordinated with [a] candidate").

held that limits on contributions are only a minor infringement of free speech because the value of the message does not increase with the size of the contribution.[213] Justice Thomas is correct in recognizing that proxy speech is protected where the contributors and candidates share similar views,[214] but this only supports removal of all political party spending limits, where mutual interests between party and candidate are less in doubt.[215] The removal of additional limits on all other persons and multicandidate political committees would ignore the reality that contributions are often made even when the contributor does not agree with a candidate's message.[216]

However, assuming that Justice Thomas is correct in asserting that there is no viable distinction between contributions and expenditures, his strict scrutiny analysis raises further concerns. First, he stated that spending limits are overinclusive.[217] For example, § 441a(d)(3) "indiscriminately covers the many conceivable instances in which a party committee could exceed the spending limits without any intent to extract an unlawful commitment from a candidate."[218]

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213. *See id.* at 20-21. *But see* Freeman, *supra* note 4, at 288 (arguing that the *Buckley* rationale should not apply to political parties because "symbolic expression of support for a candidate may be adequate for an individual or a non-party political association but it is a hollow shell for a major political party").

214. *See Colorado Republican*, 116 S. Ct. at 2327 (Thomas, J., concurring in the judgment and dissenting in part) (stating that the proxy speech rationale " 'is not useful . . . [where] the contributors obviously like the message they are hearing from [the] organizatio[n] and want to add their voices to that message' " (quoting Federal Election Comm'n v. National Conservative Political Action Comm., 470 U.S. 480, 495 (1985))). *But see* California Med. Ass'n v. Federal Election Comm'n, 453 U.S. 182, 196 (1981) ("[S]ympathy of interests alone does not convert [one's] speech into that of [another].").

215. This argument may add weight to Justice Kennedy's assertion that political party expenditure limits pose no threat to the integrity of federal elections. *See Colorado Republican,* 116 S. Ct. at 2322 (Kennedy, J., concurring in the judgment and dissenting in part).

216. For example, some individuals and corporations currently contribute to both sides in an election, thus ensuring political access to the winning candidate. *See* Vicki Kemper & Deborah Lutterbeck, *The Country Club*, COMMON CAUSE, Spring/Summer 1996, at 16, 20-23; *see also* FRED R. HARRIS, DEADLOCK OR DECISION: THE U.S. SENATE AND THE RISE OF NATIONAL POLITICS 74 (1993) (noting that after defeating seven incumbent Republican Senators in the 1986 general elections, all seven of the newly-elected Democratic Senators received contributions prior to the end of the year from PACs that had contributed previously to the Republican incumbents they defeated). If preventing the appearance of corruption is a compelling governmental interest, it may be that the mere possibility of such corruption is sufficient to justify all contribution limits. *See infra* notes 223-32 and accompanying text.

217. *See Colorado Republican*, 116 S. Ct. at 2329 (Thomas, J., concurring in the judgment and dissenting in part).

218. *Id.* (Thomas, J., concurring in the judgment and dissenting in part); *see also* Federal Election Comm'n v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 253-56 (1986)

He argued that FECA's disclosure requirements, applied in conjunction with federal bribery laws, are the least restrictive means of preventing corruption.[219] However, it is often difficult to identify what constitutes the least restrictive means. Several Justices have expressed concern over the use of such terms because they are powerful, yet subjective, judicial weapons that if unchecked can be used arbitrarily to overturn otherwise valid legislation.[220] Additionally, if all spending limits are removed it will become nearly impossible to detect corruptive activities.[221] Therefore, although disclosure laws certainly aid in Congress's fight against corruption in federal elections, spending limits may still be justified because disclosure laws alone may be an insufficient means of achieving that end.[222]

(holding that FECA expenditure limits on non-profit, non-stock corporations were overinclusive because they applied to smaller corporations that posed no threat of corruption).

219. *See Colorado Republican*, 116 S. Ct. at 2329 (Thomas, J., concurring in the judgment and dissenting in part). Justice Thomas essentially adopted the position of former Chief Justice Burger, who in *Buckley* determined that the legislative means of preventing corruption were not narrowly tailored. *See* Buckley v. Valeo, 424 U.S. 1, 246 (1976) (per curiam) (Burger, C.J., concurring in part and dissenting in part). In his analysis, Chief Justice Burger stated that money in federal elections presents two problems because "money . . . can buy favors . . . [and] money is a less visible form of associational activity." *Id.* (Burger, C.J., concurring in part and dissenting in part). However, contribution limits do not solve the problems because they fail to reach other, equally corrupt, forms of association. *See id.* (Burger, C.J., concurring in part and dissenting in part). An example of such corrupt association is an "eleventh-hour endorsement by a former rival, obtained for the promise of a federal appointment." *Id.* (Burger, C.J., concurring in part and dissenting in part). As to the second problem, Chief Justice Burger stated that disclosure requirements "make the invisible apparent." *Id.* (Burger, C.J., concurring in part and dissenting in part).

220. *See* Illinois Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 188-89 (1979) (Blackmun, J., concurring). According to Justice Blackmun,

> "least drastic means" is a slippery slope and also the signal of the result the Court has chosen to reach. A judge would be unimaginative indeed if he could not come up with something a little less "drastic" or a little less "restrictive" in almost any situation, and thereby enable himself to vote to strike legislation down.

Id. (Blackmun, J., concurring); *see also* Eu v. San Francisco County Democratic Cent. Comm., 489 U.S. 214, 233-34 (1989) (Stevens, J., concurring) (relying on Justice Blackmun's concurrence in *Illinois Board of Elections* to express a similar apprehension). Justice Blackmun, in *Illinois Board of Elections*, also expressed concern over the vague terminology of "compelling state interest": "If it means 'convincingly controlling' or 'incapable of being overcome upon any balancing process,' then . . . the test merely announces an inevitable result, and the test is no test at all." *Illinois Bd. of Elections*, 440 U.S. at 188 (Blackmun, J., concurring).

221. *See Buckley*, 424 U.S. at 27-28; *see also* Nahra, *supra* note 2, at 105 (stating that it would be "very difficult for the government to prove 'corruption' aside from the most blatant kinds of bribery").

222. *See Buckley*, 424 U.S. at 28. In *Colorado Republican*, Justice Thomas argued that even if disclosure requirements and bribery laws prove to be ineffective, Congress is still not entitled to enforce preemptive bans on campaign spending. *See Colorado Republican*,

An additional element of Justice Thomas's strict scrutiny analysis merits consideration. Justice Thomas rejected preemptive bans on all spending limits because they restrict contributions and expenditures in the absence of evidence that persons are "in fact engaging, or [are] likely to engage, in bribery or anything resembling it."[223] The position is representative of recent opinions that place decreased importance on the government's interest in preventing the appearance of corruption in federal elections.[224] But in *Buckley*, the Court stated that it was equally and independently concerned with "the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse."[225] By requiring evidence that the threat of corruption be " 'real, not merely conjectural,' "[226]

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116 S. Ct. at 2329 (Thomas, J., concurring in the judgment and dissenting in part). This assertion, however, is inconsistent with the view that the First Amendment is not an absolute right. *See supra* note 103 and accompanying text. It is also contrary to the very purpose of strict scrutiny—determining when it is permissible for the legislature's interest to override First Amendment freedoms. *See supra* note 104-05 and accompanying text. Justice Thomas also argued that contribution limits are not justified merely because expenditures are available as an alternative means to political expression. *See Colorado Republican*, 116 S. Ct. at 2329 (Thomas, J., concurring in the judgment and dissenting in part). However, the Court has previously considered and rejected that argument. *See* California Med. Ass'n v. Federal Election Comm'n, 453 U.S. 182, 199 n.20 (1981) ("Because we conclude that the challenged limitation does not restrict the ability of individuals to engage in protected political advocacy, Congress was not required to select the least restrictive means . . . ."); *Buckley*, 424 U.S. at 28.

223. *Colorado Republican*, 116 S. Ct. at 2329 (Thomas, J., concurring in the judgment and dissenting in part). Justice Thomas noted that the Court has accepted only the prevention of political quid pro quo as a compelling governmental interest supporting expenditure limits. *See id.* at 2328 (Thomas, J., concurring in the judgment and dissenting in part) (citing Federal Election Comm'n v. National Conservative Political Action Comm., 470 U.S. 480, 497 (1985)). *But see* Nicholson, *supra* note 148, at 988 ("Although [*Buckley*] used the terms 'corruption' and 'undue influence' interchangeably without defining them, it seemed to include more than the quid pro quo or prearranged bribe . . . ." (footnote omitted)).

224. *See National Conservative PAC*, 470 U.S. at 499 (stating that "a tendency to demonstrate distrust" is not sufficient to justify spending limitations); *see also* Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 689 (1990) (Scalia, J., dissenting) (asserting that a statute is not narrowly tailored to a government interest if it prohibits speech merely because it has the potential to produce social harm).

225. *Buckley*, 424 U.S. at 27. In *Buckley*, the Court found that no reliable means to detect actual corruption existed, yet stated that the Watergate scandal demonstrated that the concern was not illusory. *See id.* at 26-27. Additionally, the Court in *Citizens Against Rent Control* recognized an exception to the rule invalidating limits on First Amendment activity where there is a "perception of undue influence of larger contributions to a *candidate*." Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 296-97 (1981); *see also* Nicholson, *supra* note 148, at 988 n.187 ("The Court implied in *Buckley* that preventing the appearance of corruption, even when no actual corruption was likely to occur, would establish a compelling government interest.").

226. *Colorado Republican*, 116 S. Ct. at 2331 (Thomas, J., concurring in the judgment

Justice Thomas ignored the simple reality that there need not be a prior agreement between the candidate and contributor for the latter to gain undue access to and influence over the former.[227] Large contributions do not only secure government appointments but are a means of gaining access to elected officials.[228] Having accepted the preservation of public confidence in the integrity of the electoral system as a compelling governmental interest,[229] the Court should not necessarily invalidate spending limits because the government fails to produce evidence of actual corruption.[230] For example, if suspicions of corrupt conduct arise from the public's increased awareness of and concern over the growth of PACs,[231] even though that corruption may only be a hypothetical possibility, spending limits designed to reduce the appearance of corruption should not be invalidated where

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and dissenting in part) (quoting Turner Broad. Sys., Inc. v. FCC, 114 S. Ct. 2445, 2470 (1994)).

227. *See* Wright, *supra* note 107, at 617 (noting that a candidate, once elected, knows his chances of reelection depend on his giving "attention and deference to the views of those who helped him financially").

228. *See* Buckley v. Valeo, 519 F.2d 821, 838 (D.C. Cir. 1975), *aff'd in part, rev'd in part*, 424 U.S. 1 (1976) (per curiam). Such contributions are "motivated by the perception that this was necessary as a 'calling card, something that would get us in the door and make our point of view heard.' " *Id.* at 839 n.37 (quoting *Hearings Before the Senate Select Comm. on Presidential Campaign Activities*, 93d Cong. 5442 (1973) (statement of Orin Atkins, Chairman, Ashland Oil Co.)); *see also* Fleishman, *supra* note 4, at 865-66 (identifying as a principal governmental objective "diminishing contribution-based post-election influence"). *See generally* ELIZABETH DREW, POLITICS AND MONEY: THE NEW ROAD TO CORRUPTION (1983) (examining the effects of money on the political system and how the financial needs of public officials open new opportunities for special interests to shape national policy).

229. *See National Conservative PAC*, 470 U.S. at 511 (White, J., dissenting); First Nat'l Bank v. Bellotti, 435 U.S. 765, 788-89 (1978); *Buckley*, 424 U.S. at 27.

230. In his dissent in *National Conservative PAC*, Justice White stated:

> We need not evaluate the accuracy of reports of such activities .... It is enough to note that there is ample support for the congressional determination that the corrosive effects of large campaign contributions—not least among these a public perception of business as usual—are not eliminated solely because the "contribution" takes the form of an "independent expenditure."

National Conservative PAC, 470 U.S. at 511 (White, J., dissenting).

231. Political action committees have grown tremendously since the Court's decision in *Buckley*. *See* HARRIS, *supra* note 216, at 73 (reporting that PACs grew in number from 608 in 1974 to nearly 4,200 by 1990, and PAC contributions increased from $8 million to $172.4 million between 1972 and 1988). Other scholars have noted similar increases in PAC growth. *See* MEREDITH WHITING ET AL., THE CONFERENCE BOARD, CAMPAIGN FINANCE REFORM 27 (1990) (noting that PACs increased from 608 in 1974 to 4828 in 1988); Sabato, *supra* note 186, at 188 (reporting that PACs increased in number from 113 to 4,268 between 1972 and the end of 1988 and PAC contributions increased "almost eighteen-fold, from $8.5 million in 1971-1972 to $151.3 million in 1987-1988"). One author suggests that it is no coincidence that such growth is greater in highly regulated areas. *See* Wright, *supra* note 107, at 616-17.

those limits have a significant effect in restoring public confidence in the election process.[232]

Justice Thomas's rejection of the *Buckley* framework is not necessarily an incorrect conclusion. However, the framework does not fail because no distinction can be drawn between contributions and expenditures as Justice Thomas described; rather it fails because it lacks practical effect.[233] It "blinks [at] political reality" to believe that a candidate does not recognize and appreciate expenditures made by a person on the candidate's behalf.[234] Therefore, it seems meaningless to limit contributions when a person can achieve the same end by spending on his own.[235] Political reality was acknowledged to some degree by Justice Stevens in his assertion in *Colorado Republican* that the government's interests are sufficiently compelling to limit all party expenditures.[236] He argued that the goal of spending limits is to prevent "attempts to undermine the policies of the [FECA]" and indicated that he would defer to Congress, which has "both wisdom and experience in these matters far superior to [the Court's]."[237]

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232. Consider one commentator's views on the importance of limiting the appearance of impropriety:

> To emphasize appearances is, of course, to concede a major role to illusion and emotion .... The creation of "devils" is a useful mode of social explanation for many adults, and exorcism of these devils is an important way of re-establishing the credibility and legitimacy of political institutions. The Supreme Court has failed to recognize that important fact .... That failure, in turn, is one very persuasive reason for deference to legislative assessments of political beliefs and appearances.

Frank J. Sorauf, *Caught in a Political Thicket: The Supreme Court and Campaign Finance*, 3 CONST. COMMENTARY 97, 120-21 (1986).

233. *See* Nahra, *supra* note 2, at 55; *see also supra* notes 7-10 and accompanying text (criticizing *Buckley*).

234. *National Conservative PAC*, 470 U.S. at 510 (White, J., dissenting); *Buckley*, 424 U.S. at 260-61 (White, J., concurring in part and dissenting in part); *see also* Nicholson, *supra* note 4, at 342 ("The fact that lack of control will render such expenditures somewhat less effective than contributions should not reduce the candidate's gratitude, since the candidate will realize that his or her financial supporters are doing as much as the law allows."); Susan G. Sendrow, Comment, *The Federal Election Campaign Act and the Presidential Election Campaign Fund Act: Problems in Defining and Regulating Independent Expenditures*, 1981 ARIZ. ST. L.J. 977, 985 ("The absence of coordination, i.e., independence, does not itself guarantee the absence of an improper, potentially corrupt relationship between candidate and contributor.").

235. *See Buckley*, 424 U.S. at 261 (White, J., concurring in part and dissenting in part).

236. *See Colorado Republican*, 116 S. Ct. at 2332 (Stevens, J., dissenting). Justice Stevens did not expressly state that spending limits are constitutional as applied to all persons, but his arguments clearly suggested a willingness to overturn *Buckley*. *See id.* (Stevens, J., dissenting).

237. *Id.* (Stevens, J., dissenting); *see also Buckley*, 424 U.S. at 261 (White, J., concur-

However, deference is not without its pitfalls. It entails trusting legislators with the very process that has not only employed them, but has in many ways assured them of re-election given the inherent advantages of incumbents over their challengers.[238] As a result of these inherent advantages, contributors are more willing to support incumbents because they have a better chance of winning and, therefore, incumbents have less difficulty amassing the capital needed to fund a successful campaign.[239] Although this may not entirely discourage a challenger from running against an incumbent, it decreases the level of competition and, consequently, the chances that the better-funded incumbent will be unseated.[240] Allowing legislators to regulate political activity without restraint may result in further inequities when incumbents, seeking to secure their fortunes, shift "the political balance of power so as [to] principally ... benefit themselves and their political allies."[241] As Justice Thomas noted, to defer

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ring in part and dissenting in part) (stating that Congress has more insight into election reform because its members include "many seasoned professionals who have been deeply involved in elective processes and who have viewed them at close range over many years").

238. It is argued that incumbents have advantages over their challengers because of name recognition, local and/or national reputation, media access, campaign organization, publicly provided personnel and supplies, and a general perception of challengers as weak. *See, e.g.*, WHITING ET AL., *supra* note 231, at 25-26; Adamany, *supra* note 186, at 536; Fleishman, *supra* note 4, at 878; L. Sandy Maisel, *The Incumbency Advantage*, *in* MONEY, ELECTIONS, AND DEMOCRACY, *supra* note 186, at 119, 122; Cass R. Sunstein, *Political Equality and Unintended Consequences*, 94 COLUM. L. REV. 1390, 1400-03 (1994); *see also* Fred Wertheimer & Susan Weiss Manes, *Campaign Finance Reform: A Key to Restoring the Health of Our Democracy*, 94 COLUM. L. REV. 1126, 1134-36 (1994) (discussing the favoritism toward incumbents shown by the current campaign finance system); Wright, *supra* note 107, at 621 (arguing that challengers are deterred from entering races because of the immense sums needed to finance a campaign under the current FECA system). One commentator suggests that a reason political parties may not present a threat of corruption is because "incumbency creates its own power." Freeman, *supra* note 4, at 290.

239. *See* Maisel, *supra* note 238, at 125 (noting that in 1986 incumbents received nearly 76% of all PAC contributions); *see also* Adamany, *supra* note 186, at 535 (stating that political contributors support those who have a real chance of winning). Adamany argues that if a challenger is unlikely to win, contributors may support the incumbent or choose to not contribute at all. *See id.*

240. *See* Maisel, *supra* note 238, at 125-26. Maisel noted that since 1972 90% of all members of Congress seeking re-election to the House of Representatives have retained their office. *See id.* at 119. In 1988, of the 407 incumbents seeking re-election, only one was defeated in the primaries, while only six were defeated in the general elections; the re-election percentage for that year was 98%. *See id.* at 121. Maisel also reported that between 1946 and 1988, the reelection percentage fell below 90% only five times. *See id.* at 120.

241. BeVier, *supra* note 7, at 1076; *see also* Polsby, *supra* note 4, at 39 ("The power of incumbent politicians to affect the election process in undemocratic ways is, indeed, greater than ever...."); Wertheimer & Manes, *supra* note 238, at 1136 ("What is at stake

entirely to Congress allows it to shape the electoral playing field to its benefit and to the detriment of the electorate:

> What the argument for deference fails to acknowledge is the potential for legislators to set the rules of the electoral game so as to keep . . . potential challengers out of it . . . . Indeed, history demonstrates that the most significant effect of election reform has been not to purify public service, but to protect incumbents and increase the influence of special interest groups.[242]

It may be that the damage caused by deferring to Congress is not sufficiently compelling to deny Congress the powers granted to it under Article IV.[243] But FECA, however comprehensive, remains riddled with loopholes that diminish its effect in preventing the appearance and reality of corruption.[244] An example is the "bundling loophole," which allows PACs to escape the $5,000 contribution limits by channeling its members' contributions directly to its candidates.[245] Additionally, "soft money" contributions are another means of evading FECA limitations,[246] and are seen by some as the

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is the fairness of the electoral process . . . .").

242. *Colorado Republican*, 116 S. Ct. at 2329 n.9 (Thomas, J., concurring in the judgment and dissenting in part) (citations omitted). Justice Thomas compared congressional deference in the federal elections to "letting the fox stand watch over the henhouse." *Id.* (Thomas, J., concurring in the judgment and dissenting in part).

243. *See* Michael J. Perry, *Interpretivism, Freedom of Expression, and Equal Protection*, 42 OHIO ST. L.J. 261, 307 (1981) (arguing that incumbents resolve First Amendment issues impartially because many First Amendment issues have little effect upon chances for reelection and, further, that it is "fanciful to suppose that incumbents would often protect their incumbency by conspiring to deny the electorate access to . . . information and ideas").

244. Ironically, the very reason FECA was passed was because its predecessor, the Federal Corrupt Practices Act, had so many loopholes that the act was rendered "practically useless." Nahra, *supra* note 2, at 63 (citation omitted).

245. *See* HARRIS, *supra* note 216, at 76-77; *see also* Anne H. Bedlington, *Loopholes and Abuses*, *in* MONEY, ELECTIONS, AND DEMOCRACY, *supra* note 186, at 69, 79-81 (discussing the problems presented by the bundling loophole); Wertheimer & Manes, *supra* note 238, at 1140-41 (concluding that, as a result of the loopholes, "PAC[s] . . . get[] the credit [for the contributions]—and the influence that flows from [them]"). Such a loophole could be closed by "requiring that any such contributions be counted toward the intermediary's *and* the original donor's limits" and by prohibiting combined contributions. WHITING ET AL., *supra* note 231, at 27.

246. Fred Wertheimer and Susan Manes explain the "soft money" loophole as follows:

> First, PACs, corporations, and wealthy individuals make contributions to a candidate's political party. Because these contributions are not made directly to the candidate, they are not subject to the limits under current campaign finance laws. The political party then channels this "soft money" to state political parties, where it is spent to support the presidential campaign by financing activities such as get-out-the-vote drives. Presidential candidates can thereby raise money, through their political parties, that is not subject to the campaign contribution

most pernicious threat to federal elections today.[247] Soft money contributions raise significant questions of accountability because such expenditures are not fully disclosed and may result in political inequities that overshadow those created by traditional "hard-money" contributions.[248] The presence of such a loophole in the FECA, *not* of the Supreme Court's making, is a further reason for questioning the validity of judicial deference in regard to federal elections.[249] Moreover, even if FECA could be designed to preclude all possible loopholes, it still may not prevent the danger of political quid pro quo, "since the candidate will realize that his or her financial supporters are doing as much as the law allows."[250] Ultimately, one must conclude that it belies political reality to believe that those with the desire to influence political candidates, and those who possess the necessary resources, will be unable to find a way to do so.[251]

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limits.

Wertheimer & Manes, *supra* note 238, at 1144-45. FECA does not prohibit "soft money" contributions "specifically designated to defray any cost for construction or purchase of any office facility not acquired for the purpose of influencing the election of any candidate in any particular election for Federal office." 2 U.S.C. § 431(8)(B)(viii) (1994). Such funds are supposed to go into "non-federal" accounts and should not be used to finance a candidate's federal election campaign. *See* Kemper & Lutterbeck, *supra* note 216, at 20; *see also* WHITING ET AL., *supra* note 231, at 19 (discussing the significance of soft money in federal elections).

247. *See* Kemper & Lutterbeck, *supra* note 216, at 19 ("Soft money flies in the face of all contribution restrictions .... [M]any soft money donors are giving huge sums to one or both parties with the understanding that their contributions will win them access and influence ...."). *But see Colorado Republican*, 116 S. Ct. at 2316 (asserting that "soft money" contributions at best pose a minimal threat of corruption in federal elections). Of particular note are those individuals and corporations who contribute to both sides in an election, thus ensuring political access to the winning candidate. *See* Kemper & Lutterbeck, *supra* note 216, at 20-23; *see also* Adamany, *supra* note 186, at 535 (arguing that "political elites [rarely] contribute resources solely from ideological motivations").

248. *See* David Adamany, *The Unaccountability of Political Money*, *in* MONEY, ELECTIONS, AND DEMOCRACY, *supra* note 186, at 95, 104.

249. *See* BeVier, *supra* note 7, at 1078 ("The historical ineptitude of legislatures attempting electoral reform suggests that deference to legislative 'expertise' is unwarranted. Example after example illustrates that political reformers have not yet figured out how to mold political reality into conformity with their stated political vision.").

250. Nicholson, *supra* note 4, at 342 (footnote omitted).

251. *See* Buckley v. Valeo, 424 U.S. 1, 265 (1976) (per curiam) (White, J., concurring in part and dissenting in part) ("One would be blind to history to deny that unlimited money tempts people to spend it on *whatever* money can buy to influence an election."); *see also* Sorauf, *supra* note 232, at 119 (stating that the *Buckley* Court, excluding Justice White, "[d]espite all the arguments and stipulations ... never grasped the idea of a flow of money, which if stopped at one outlet would build up pressure at others"). Sorauf goes on to state that the Court "betrayed some lack of sophistication about the enormous complexity of social causation." *Id.* at 120; *see also* WHITING ET AL., *supra* note 231, at 25 (noting that some commentators reject elimination of PACs as a possible reform because that would "simply set clever campaign operatives to work devising new ways of raising the vast

Today, federal election law is in a quandary. Unless the Supreme Court overturns *Buckley*, campaign finance law will be adjudicated within a framework that severely undermines any legislative attempt to balance the government's interest with the First Amendment freedoms of speech and association. On the other hand, if the *Buckley* framework is abandoned, too much power may be placed in the hands of the elected, which could prove as deleterious to the integrity of the electoral process as the spending Congress wishes to regulate. In any event, without restrictions on bundling and soft money contributions, FECA is still an inefficient means of preventing the appearance and reality of corruption. In *Colorado Republican*, a partial solution is offered. Unlimited political party spending will strengthen the role of a political entity that is not only essential to the political process, but also poses the least threat of corruption.[252] Given Justice Breyer's implied agreement with that solution and Justice O'Connor's positions in previous Supreme Court decisions, it is likely that, when the Court finally considers the issue, *all* spending limits imposed on political parties will be held unconstitutional.[253]

Additional measures must be taken, however, if unlimited spending is to have any effect in strengthening political parties. Stricter spending limits must be placed on political action committees,[254] and soft money contributions must be regulated.[255] Additionally, tax credits could be enacted to provide an incentive for persons to contribute directly to political parties and thereby lessen the impact of independent spending.[256] Ultimately, one needs to recognize that there will always be factions which seek to exert

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amount of money it takes to run a successful campaign").

252. *See Colorado Republican*, 116 S. Ct. at 2322-23 (Kennedy, J., concurring in the judgment and dissenting in part).

253. *See supra* note 182 and accompanying text (predicting future Supreme Court alignment on election law decisions).

254. Party decline can be partially attributed to PACs because their "prominence ... tends to pull candidates away from adherence to a party program." Adamany, *supra* note 186, at 549; *see also* Herbert E. Alexander, *The Future of Election Reform*, 10 HASTINGS CONST. L.Q. 721, 742-43 (1983) (discussing candidates' reliance on PACs, which gives PACs "direct access to successful candidates without the mediation of a party to accommodate the conflicting claims of all the individuals and groups seeking to influence public policy").

255. *See* Wertheimer & Manes, *supra* note 238, at 1156 ("No campaign finance reform will work or be publicly credible unless it shuts down the soft money system ...."). One commentator suggests that raising limits on coordinated general election expenditures would offset the impact of restrictions on soft money contributions. *See* Bedlington, *supra* note 245, at 87.

256. *See* Polsby, *supra* note 4, at 40; Sabato, *supra* note 186, at 200-02.

influence on those in power.[257] A belief that we can eliminate special interests in federal elections, whether those interests are representative of the electors or the elected, is misguided. At best, we can only hope to limit the effects of those interests.[258] In the context of federal elections, strengthening the role of political parties may not be a perfect solution, but it is the first step in recognizing the political realities of campaign finance.

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257. *See* THE FEDERALIST NO. 10, at 58 (James Madison) (Jacob E. Cooke ed., 1961).

258. *See id.* at 60 ("[T]he *causes* of faction cannot be removed; . . . relief is only to be sought in the means of controlling its *effects*.").